



I Do allow the PRINTING and PUBLISHING of this BOOK, Entituled
Tryals Per Pais : Or, The Law
of England, Concerning Juries by
Nisi Prius.

Fr. Pemberton.





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Tryals per Pais,
OR THE
Law of England
CONCERNING
JURIES
BY
Nisi Prius, &c.

The Second Edition, Newly Revised,
and much enlarged, with an Addition of
Precedents, and Forms of Challenges, De-
murrers upon Evidence, Bills of Exception,
Pleas puisne Darrein Continuance, &c.

Very Useful and Necessary for all Lawyers, Attorneys and
other Practicers, especially at the Assizes.

By G. D. of the Inner Temple, Esquire. *Duncombe*

*Per testes solum, lex ipsa nunquam litem dirimit, quæ per Juratam
xij. hominum decidi poterit. Cum sit modus iste ad veritatem
eliciendam multo potior, & efficacior, quam est forma aliquarum
aliarum legum orbis. Fortescue. cap. 21.*

L O N D O N,

Printed for George Dawes, and are to be Sold by
Matthew Wotton, at the Three Pigeons, against
the Inner Temple Gate, in Fleetstreet, 1685.

OF THE
LAW OF ENGLAND

CONCERNING
TORIES

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Remarks and Notes of Cases, &c. &c.
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LONDON:
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TO THE
PRACTICERS
OF THE
LAW.

Gentlemen,

IN the Dedication of Books,
such persons should be chosen;
whose Studies or Profession
agree with the nature of
the Subject. To prove conclusions,
in one science, by the Heterogeneous
Principles of another;
To make a Grammarian Patron to
a piece of the Mathematicks; to
dedicate a Treatise of Logick to

To the Practicers

a Master of Musick, or a matter of Practice, to a man of Speculation; would not only be improper, but absurd. You know that in the whole Practice of the Law, there is nothing of greater excellency, nor of more frequent use, than Tryals by Juries. In this, our Common-Law (and not without just cause) values it self, beyond the Imperial Laws, before the Canon Law, or any other Laws in the world. And seeing the hopes and life of all the Process, the force of the judgement, and the truth, nay the right of the Parties, lie in the Tryal; for as one elegantly says, *Qui non probat, at the Tryal, dicitur veritate & jure carere*, and indeed the knowledge of all the Law, tends to this: for without victory at the Tryal, to what purpose is the science of the Law? The Judge can give no sentence, no
decisi-

of the Law.

decision without it, and must give judgement for that side, the Tryal goes; therefore I may well say, 'tis the chief part of the Practice of the Law: And if so, to whom should I offer this Treatise, but to you, the Practicers?

I need say nothing for small Tracts and Treatises: The infinite number of them in the Civil Law (there being for every Title, a distinct Tract) may the number of them in our Law, sufficiently shews their use.

Ringelbergius, in his Book de ratione studii, giving directions what books Students ought to carry with them, when they change places, and travel from one to another, tells us, That out of the Volumes (by reason of their bigness not portable) he used to tear out several leaves, and take them with him, in his journeys, and so he says he had served the works of Pliny, Tully, Plato,

To the Practicers

Demosthens, &c. although he had given great prices for them; which justifies the writing of this Treatise, the subject matter thereof, being of such general use in all Circuits.

When I read the elaborate books of Farinacius de testibus, and the 3 Exquisite and Incomparable Volumes of Mascardus de probationibus, in the Cesarian, and Pontifical Laws, (which works were so valued and esteemed, that they were looked upon as new lights sent from Heaven, by the professors of those Laws:) I could not but see the defect, and want of such books, in our Law: for surely they are as necessary in the one as in the other. And although I cannot compare my weak indeavours, with those excellent and methodical works, theirs being intire, this only quasi an Abridgement, fitted for use, not for show: Yet until more learned, and judicious
Pro-

of the Law.

Proficients in our Law, shall undertake the work, I thought fit to produce mine.

To compare this sort of Tryal by Jury, with the Tryals of other Laws and Countries, and declare how much and wherein it excels them all, after Fortescue de laudibus, &c. and his learned Commentator; would be like the arrogance, of Limning after Apelles, and requires the room of a *Volumen*, rather than an Epistle. And considering my own insufficiencies, I shall praise it more by saying nothing, than all I can: for to say less than a thing deserves, would be, instead of an *Encomium*, a disparagement. Therefore I shall content myself only to say, that Tryals in other Laws are by Witnesses only, privately examined; This, by Witnesses publickly examin'd and confronted; and by Jury also, and so consequently the fact

To the Practicers

fact is settled, with the greater certainty of truth, upon which the uprightness of the judgement depends.

It would be well if there were less corruption in the returning of Juries, but I think 'tis parallel'd, if not exceeded, by that of examining Witnesses privately, on whose depositions, the Tryals in other Laws consist: And so that must be no objection against the thing. I hope an expedient may be found out to prevent the corruption in returning Juries, but I believe it never can in the other.

To say this Tryal by Jury is too popular in a Monarchy, would be a good objection, from a French-man, but not of any English-man, who lives under the best tempered Monarchy, and the best sort of Government in the World, to which this manner of Tryal is so proper, and well accommodated, that neither the wisdom of our Ancestors

of the Law.

stors could, nor (I may say) can this present, nor after ages invent a better.

But as the unskilful Painter, drew a Curtain, before what he could not express, with his Pencil, so must I vail, with silence, the excellencies of this Celebrated Tryal, which I am not able to delineate.

Gentlemen,

To make an Apology for the stile of a Law book, especially of an Epitome, would be a vain thing, *Ornari res ipsa negat contenta doceri*; neither shall I make any Apology for my undertaking this work: if 'twas better performed, yet Momus would be carping; and if 'twas worse, it would be good enough for him, who cannot, or will not, do it better: Be it what it will your kind reception will abundantly satisfy

Your Servant

G. Duncombe.

Pre-



THE
PREFACE
TO THE
FIRST EDITION.

THE Philosopher could not see a man unless he heard him speak ; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only discriminates the Man : For, although an *Ideot* who hath but the shape of a man, may with silence so hide his folly, that strangers to his Manners cannot discern him from a Sophister ; Yet, doubtless, Silence is the greatest Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the bravest spirits.

Where-

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*Historia facil
princeps.*

Wherefore Learned *Salust* from this takes his Exordium ; *Omnes homines qui sese student prestare ceteris animalibus, summa ope niti decet, ne vitam silentio transeant, veluti pecora:* Those men who would excel Beasts, should labour that their lives might not pass in such silence, as Beasts do. It seems he deemed, that man little inferior to a Beast, who acted nothing to prolong his Memory ; For this he held to be the duty of every man, saying, *Quo mihi rectius esse videtur, ingenii quam virium opibus gloriam querere ; & quoniam vita ipsa, quam fruimur, brevis est, memoriam nostri quam maxime longam efficere :* In my opinion, 'tis far better, to acquire Glory by the Riches of Wit, than strength ; and because our lives are short of themselves, we should endeavour by Ingenuity, to eternize their memory.

*Nulla dies
sine linea.*

And to effect this, *Nulla dies abeat, quin linea ducta supersit ;* No day should pass over our heads wherein we should not act some memorable exploit : Men should not live like *Snails*, never stirring out of their
houses

The Preface.

houses; but be active (I mean not busie, bodies in other mens matters, but) in their own Callings, of which the wise Cato tells us, *Every man should give a reasonable account*; And if we believe the famous Seneca, *Nihil est turpius quàm grandis natu senex, qui nullum habet vitæ suæ argumentum, quo diu se vixisse dicat, præter atatem*: Nothing is more unworthy, than an old man, who hath nothing to shew for his Antiquity, but a Gray-Beard; Whose soul served only as Salt to keep his body sweet, and is no sooner dead, than forgotten, long before he is half rotten; yet who is so apt to deride the Endeavours of other men, as this ancient *Ignoramus*, whose wrinkles in his face, worn-out looks, and many years sway more with the vulgar people, than all the Arguments of Law or Reason? Had Seneca been such a silent *Momus*, the World would never have been blest with his so learned Works. And doubtless writing Books is needful in no Science more than in the Law; For without Books, how would the Lawyers do for Arguments at the Bar, or Resolutions at their Chambers? Whence
the

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the Oracle Sir Edward Cook pronounces this, *Omnes debere Juris-prudentia libris componendis animum adhibere*; That all men ought to addict themselves to the Composing Books of Law; some to the Reporting of the Judgments and Resolutions of the Judges, who are *Lex loquens*; and some to the collecting of these Cases and Resolutions, methodizing, and fitting them for some particular purpose, as Littleton, Stamford, Fitzherbert, Crumpton, Perkins, Finch, &c. and indeed, most of the Law-Books extant, if not all, (setting aside the Reports) are nothing else, but Collections out of others. This I speak, not in Derogation of them, in the least; for as 'tis equally, if not more laborious; so 'tis full as glorious, Judiciously to cull authentick Cases out of the Volumes of the Law, (where so many are no Law) and rightfully place them in a particular Treatise, as 'tis to report the Judgements and Resolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and Cook's Institutes merit as much as his Reports; And

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And *Asb's Tables*, *Fitsherbert*, and *Brooks's Abridgement*, are as useful as the Year-Books themselves, of which kind of Collections, one elegantly thus breaks out, *Quo quidem beneficio, haud scio, aut aliud aut legum Candidatis magis gratum, aut Reipublice magis commodum, aut divini honoris illustrationi magis idoneum, vel cogitando quidem consequi, quisquam poterit.* Than which benefit I know not, whether any man can even imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the illustration of Divine honour more fit. For with the least labour, a small price, and little time, they present you with those Resolutions, and Judgements which lye scattered in the Voluminous Books of the Law; which would otherwise cost much time, pains and charges, to find out. The thoughts of which publick good, first gave life to these Endeavors of mine: Not that any one should in the least imagine, that I am so guilty of vain Ostentation, as to believe, that my

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Parts or Abilities can perform any thing in this kind, like other men: No, *Ipse mihi nunquam Iudice me placui.* I could never yet please my self with my own labours, much less are they worthy to please others; *hanc equidem tali me dignor honore.* However, when I consider, that no man hath yet written particularly concerning this Subject, and of what general use it is, I doubt not, but that this Treatise will receive a favourable construction from most men, and a plausible acceptation from others.

The use of
the Book.

The use of it, is, in a manner Epidemical; since mens Lives and Estates are subject to that Tryal *per Pais*, here demonstrated; but in particular, the Practisers at Law, (especially *Circuit-Advocates, Attorneys, Sollicitors, Clerks, &c.*) and all *Jurors*, (for whose directions it is of singular use) are chiefly concerned herein. But I will not hang a Bush out, to invite, and prepossess your Judgements, *Vincat Utilitas.* The profit which every ingenious Reader shall gather out of it, will

The Preface.

will speak more for it, than the best Eulogical Preface.

And for my own part, I profess myself to be *Philomathes*; but not *Poly-mathes*. And notwithstanding the hard-favoured objections, which some men cast upon it, I really think the study of the Law, to be the most pleasant Study in the world. And he which delighteth in the Study of any other Art or Science, must consequently be delighted with this. For the knowledge of the Law, as *Doderidge* saith, is most truly stiled, *Rerum Divinarum humanarumque scientia*; and worthily imputed to be the Science of Sciences; for therein lies hid, the knowledge of every other Learned Science.

So that he which gives himself to the study of Divinity, may here fill himself with holy and pious Principles of Divine Laws: For, *Lex est sanctio sancta, jubens honesta, & prohibens contraria; sanctum etenim oportet, quod esse sanctum definitum*: The Law is a holy Sanction, or Decree, commanding things

a 2

Fortescue, cap. 3.

The Preface.

things that be honest, and forbidding the contraries : Now the thing must needs be holy, which by definition, is determined to be holy. So that in this respect, saith *Fortescue*, men may well call *Lawyers Sacerdotes*, that is, givers, or teachers of holy things. For the Laws being holy, it followeth, that the Ministers, and setters forth of them, must be givers of holy things ; and so by interpretation, doth *Sacerdos* signifie ; and doubtless, he which duly considers those Rules of *Theology*, which lie scattered throughout the wholebody of the Law, must needs conclude our Laws to be Commentaries upon the Old and New Testament ; and do so much bear the Image *Legis Divinae*, that they may well be attributed to the Most High.

The Rules of *Grammar*, *Philosophy natural*, *Political*, *Oeconomick*, and *Moral* ; as also the Grounds of *Logick*, and of other Arts, and Sciences, so much abound in our Books, that the very reading of the Law, will make a man *Master* of any of those Sciences.

And

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And since *Rhetorick* is *Ars ornatè dicendi*, and consisteth of those two parts, *Elocution*, and *Pronunciation*; How can we read in our Law-Books, those Learned Arguments, Elegant Speeches, and Judgements pronounced with such Eloquence and Elegance of words and matter, and not conclude, that Rethorick is the Glory and Grace of a Lawyer? Though some (not gifted that way) would perswade us, that the Law hath little relation to it.

If any man be delighted in History, let him read the Books of Law, which are nothing else but Annals and Chronicles of things done and acted from year to year, in which every Case presents you with a petite History; and if variety of matter doth most delight the Reader, doubtless, the reading of those Cases, (which differ like mens faces) though like the Stars in number, is the most pleasant reading in the World.

I thought to have expatiated my
a 3 self

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self in this Eulogical Commendation of the Study of the Law ; But when I consider the Glory of the thing it self, I think it but in vain to light the Sun with Candles ; and as no Arguments will perswade one to love against Nature, so he whom the excellency of the Law it self cannot invite to study it, will never be forced to it with the fist of Logick, or other perswasion : Wherefore 'tis now time to expose my self to the Censure of the Reader , who always judges according to his capacity, or affection ; for which cause, if I were to chuse my Reader, I could wish with *Caius Lucilius*, *Quod ea quæ scribo, neque ab indoctissimis, neq; à doctissimis legi, quod alteri nihil intelligerent, alteri plus fortasse, quàm ipse de se* : That this Treatise might not be read, of the most Learned, nor of those who are not learned at all, because these understand nothing, and the others more perhaps than my self.

*Bracton, l. 1.
fol. 1.*

However, I put this Request to all,
Ut si quid superfluum, vel perperam positum, in hoc opere intervenerit, illud corrigant, & emendent, vel Conniventibus

The Preface.

tibus oculis pertranseant ; Cum omnia habere in memoria, & in nullo peccare, divinum sit potius quàm humanum : That if any thing be superfluous, and placed amiss in this Work, That they will either correct and amend it, or without carping connive at it ; since to remember to do all things right, and nothing amiss, is rather the part of a God, than Man : wherefore let him which never offended, cast the first stone.

in a gentle part of the
and in a gentle part of the
and in a gentle part of the
if any thing be imperfect, and his
and smiles in this Work, thereby will
either correct and amend it, or with-
out crying conceive it; since to re-
member to do all things right, and no
thing amiss, is rather the part of a
God, than Man: who store for him
shall never offend, and the first

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Array, &c. And the Proceed-
ings thereupon. Pleas. Puis
le Darrein Continuance; De-
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Tryals



Tryals per pais.

C A P. I.

The Derivation of the Word [*Jury*.]
The Definition, Antiquity and Excellence of Juries.

Jurie (Jurata) cometh of the French vid. Cap. 12
word [Jurer, i. e. Jurare.] And signifies Juric.
nifieth in Law, those 12 men who are
sworn Judges in matters of fact, evidenced by witnesses, & debated before them: I
call them Judges, because, as 'tis the property
of the Court, Jus dicere; so 'tis in the power of
the Jury to determine the fact, upon an Evidence Pro, and Con; According to those
common Adagies, Ad questionem Juris respondent
Judices; Ad questionem facti respondent
Juratores: And as the Judgment of the
Court

Vid. cap. 15. Court ought to be guided by the Law ; So is the Verdict of the Jury , by the Evidence. They of the Jury are called Juratores Jurors, à Jurando, as in ancient Laws Sacramentales à Sacramento præstando.

The Antiquity and excellency of Juries.

I need not here divide and shew the differences of Juries, nor the several sorts, they being so well known, viz. The Grand Jury, or great Inquest; and petty Jury, or Jury of Life and Death, in Criminal causes, and in Civil Causes, the Assise Jury. Inquest of Office : By some called Inquest of Jury, and Inquest of Office. Something concerning each of these, will incidently be spoken of in what follows. As to the excellency of Juries, it appears from their Antiquity.

Sr. Hen. Spelman, verb. [Inquestio] says, Tryal by Juries was used in England, Normannis nondam ingressis, Leg. Ed. Confess. Ca. 38 postea inquisisset Justitia, i. e. [Justitarius] per Lagamannos, i. e. [legales homines] & per meliores homines de Burgo, vel de Villa, vel de Hundredo, ubi mansisset Emptor, &c.

For as to Tryal by 12 men, though Mr. Daniel and Foyldor Virgil deny it to be older than the Conquest, and the latter says there is no Religion in it, but in the number; yet he stands fairly Corrected, by that Excellent and learned Antiquary, Mr. Camden. p. 153. who says, Whereas Polydore Virg.

Virgil writeth that William the Conqueror first brought in the Tryal by 12. men, there is nothing more untrue; For it is most certain and apparent by the Laws of Etheldred, that it was in use many years before, &c. And whereas Lamb. verb. [Centuria] says, In singulis Centuriis Comitia sunt, aique liberæ Conditionis viri duodeni, aetate superiores, una cum præposito Sacra tenentes jurento, se adeo virum aliquem innocentem haud damnaturos, contempe absoluturos, he referrs to the Laws of Etheldred, cap. 4. cited by the learned Spelman verb. [Jurata.]

And to the same doth my Lord Coke referr, Com. super Lit. 155. and Preface to his 3. and 8. Report. And as to the Religion in the number of 12. my Lord Coke gives instances ubi supra, and Sir Henry Spelman, in verb. [Jurata] supra, makes addition thereto.

So that I may truly say, Tryals by Juries have been used in this Nation, time out of mind, and were contemporary and coeval with the first Civil Government thereof and Administration of Justice; for amongst the first Inhabitants, the Britains, the Freeholders were used in all Tryals.

And Tryal by Juries was (as you see practised by the Saxons) continued by the Normans, and confirmed by Magna Charta.

And was ever so esteemed and pished in this Island, that no Conquest, no change of Government ever prevailed to alter it.

'Tis true, Tryals by Juries before the time of H. 2. were not so frequent, because *Sadæ* or *Purgationes*, *Ordalia*, Tryals by hot Iron, hot Water, cold Water, Duels, and other Superstitious ways, were then in use; but Tryals by Juries were here in the Saxons time, and were found here, and not brought in by William the Conqueror from Normandy: Nay, rather settled by Edw. the Confessor in Normandy, where he a long time was, and taught many Laws, as you may see in the book of the Customs of Normandy.

Glanvil lib. 2. cap. 7. says, *Ex aquitate autem maxima prodita est legalis ista institutio*, speaking of these Tryals in opposition to Duels, &c.

The use of Juries.

Their general use (being the only Tryers of Choses in Law, almost in all Courts throughout England) speaks them a publick good. To be tryed by ones Peers is the greatest privilege a Subject can wish for, and so excellent is the constitution of the Government of this Kingdom, that no Subject shall be tryed but by his Peers, The Lords by their's, The Commons by their's

Tryals per pais.

their s, which is the Fortress and Bulwark of their Lives, Liberties, and Estates; and if the good of the Subject be the good of the King, as most certainly it is, then those are enemies to the good of the King and State, who attempt to alter or invade this Fundamental Principle, in the administration of the Justice of this Realm, by which the Kings Prerogative has flourished, and the just liberties of the people have been secured so many Ages.

And what answer shall I make to the Princes, vehementer admiror, videlicet, ~~where~~fore are not Juries used in other Countries, if they are so good? but that of Fortescue, the Learned, who best could tell, scil. That other Countries can scarce produce one Jury, so well accomplished with Wealth and Ingeny, as one County, nay, one Hundred, can in England. Portescue ca. 29.

But not to dwell in the Porch, I will address my self to the Gravity of the Law, where you must not so much expect the flash of Rhetorick, as the light of Reason; No, the Law knows best how to express her self, in her own terms, wherefore all other Sciences must learn, with reverence, to keep their distance, And (as the Golden Finch sings) be glad to have their sparks raked up in her Ashes. Things not words most regarded in the Law. Finch. c. 3.

And

Tryals per pais.

And since an Issue is previous; and the matter of a Tryal, I shall first give you the description thereof, and then touch upon the several Tryals allowed by the Law, for discussion of the truth.

C A P.

C A P. II.

Of an Issue, and the divers' sorts of Tryals thereof: and when a Tryal shall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battail, and when by an Almanack; what Issue shall be first tryed, *per Pais*; what shall be tryed by the Court; and what by Examination of the Attorney, Sheriff, &c.

Issue, *exitus*, saith Cook, is a single, certain and material point, issuing out of the Allegations, and Pleas, of the Plaintiff and Defendant, consisting regularly upon an Affirmative and Negative, to be tryed by Twelve men; and it is twofold, scil. either special, as where the special matter is pleaded; or general, as in Trespass, Not guilty: In Assise, nul tort, nul disseisin, &c. And as an Issue natural cometh of two feveral persons, so an Issue

1. Inst. fo. 126.

*Omnia unum
aliquem sorti-
untur exitum;
vel per patri-
am, vel per
Judices termi-
nandum.*

Finch. Epistle.

Issue legal, issueth out of two several Allegations of adberse parties.

Tryals.

Note, that upon a demurrer to part, and Issue to part, though it is the best way to give Judgment upon the *questio juris* first, yet the Court may try the *questio facti* first, at their discretion.

1 Inst. 72. 125.

Lach. 4.

Rolls. tit. Tryals. 626. 723.

And to give you likewise his definition of Tryal, It is to find out, by due examination, the truth of the point in Issue or question between the parties, whereupon Judgement may be given; And as the question between the parties is twofold, so is the Tryal thereof; For either it is *questio Juris*, (and that shall be tryed by the Judges, either upon a demurrer, Special Verdict or Exception: For, *Cullibet in sua arte perito est credendum; & quod quisque noverit, in hoc se exerceat.*) Or it is *questio facti*, And the tryal of the fact is in divers sorts; First, chiefly, and most commonly, by a Jury of Twelve men, (of which kind of tryal, my intention is principally to treat in this Book.)

Proceedings
in Civil
Causes.

For by Twelve men are matters of fact (for the most part) tryed with us in England, in Causes both Criminal and Civil: In Causes Civil, after both Parties have said what they can, one against another, in Pleading; if there arise a question about any matter of fact, it is referred to Twelve indifferent men, to be Impannelled by the Sheriff, and as they bring in their Verdict, so Judgement passeth. And this the Judge is to declare as the Law is upon the fact found: For the Judge

Judge saith, the Jury finds thus, and then the Law is thus, and so we judge. For the Law arises upon the fact.

For Criminal Causes, the course is this: Proceedings
At the Kings Bench for Middl. and at the great and general Assises, and at the general Sessions of the Peace, there is one Jury called the Grand-Jury, which consists commonly of 24 men substantial men, out of every Hundred with in the County returned by the Sheriff, and they are to consider of all Bills of Indictment preferred to them, which they either approve of by writing Billa Vera, or disapprove by writing upon them Ignoramus; and those which they approve of are to be tried by another Jury called the Petit-Jury. Of the Grand-Jury may charge any person, upon their own Presentment, which will be of the force of an Indictment, and the party charged may Traverse the offence, and bring it to be tried by a Petit Jury.

Some lesser matters in these Courts are proceeded upon without a Jury, and some things are removed by Certiorari into higher Courts, and then must be tried there; and that thing to which there is a Traverse put in, must be tried and ended by a Petit Jury, which (for the most part) in all Civil and Criminal Causes are but Twelve men, which ought to be Free-men,

men, not Villains or Aliens, and lawfull men, not Outlawed, and also men of worth and honesty.

But because it is necessary to be known, that there are many ways allowed by the Common-Law, to try matters of fact, besides this by Juries, I will here repeat some of them; And for this, first hear the Oracle, who tells you, that he had read of six kinds of Certificates, allowed for Tryals, by the Common-Law.

Tryals by
Certificate.

1. The doing of service by him that holdeth by Escuage in Scotland, was to be tryed by the Kings Marshal of his Army, Per son Certificat en escript south son seal que serra mis a les Justices, saith Littleton,

2. If it be alledged in aboydance of an Outlawry, that the Defendant was in prison at Burdeaux, in the service of the Mayor of Burdeaux, It shall be tryed by the Certificate of the Mayor of Burdeaux. Note this was when Burdeaux was partel of the dominions of the King of England. Rolls iii. Tryal fo. 583.

3. For matters within the Realm, the Custome of London shall be Certified by the Mayor and Aldermen, by the mouth of the Recorder. vide apres 17.

4. By the Certificate of the Sheriff, upon a Writ to him directed, in case of Privilege, if one be a Citizen or Foreigner.

5. Tryal of Records by Certificate of the Judges, in whose Custody they are by Law. All these be in temporall Causes.

6. In Causes Ecclesiastical, as Loyalty of Marriage, general Bastardy, Excommunication, profession; These and the like are regularly to be tryed by the Certificate of the Ordinary, vide apud 16.

If the Def. claim his privilege as a Scholar of the University of Oxon, of such a Colledge, or Hall: This shall not be tryed by Certificat, but per pais, Rolls iii. Tryal. 583.

Concerning Certificates of Spiritual persons, vide Rolls ibidem. 591, 592.

7. A Record shall be tryed by the Record it self, and not per pais. But matter of fact concerning a Record is tryable by a Jury, as whether a plaint, &c. was leited according to the Custom; & non prosecutus est ullum breve, is tryable by the Country. Records.
Hob. 244. Hurr. 20. So if a Statute hath Mixt with fact.
two Seals, or but one, 1 Leon. 229. 2 Cro. 375. 1 Inst. 125. b. so in a per que servitia,

Rolls tit.
Tryal. 574.

Why there
needs no
visne, where
Letters Pa-
tents were
made; other-
wise in plead-
ing Deeds.
4 Rep. 71.

Deel.

if the Tenant say he held not of the Conus-
sor Jour del noie levie, shall be tryed per pais.
In Escape upon a Capi returned ne unques
in son gard, shall be tryed per Record, but up-
on a Capias not returned, the prison shall
be tryed per pais. So shall an action brought
by Covin, for the Covins not of Record. In
a scire facias per Roy to have execution of a
Judgment in a Quare impedit, if the Def. say
that after the Recovery the King presented,
& issint Judgement execute, and the issue be
whether the King presented per cause del
Judgement, or of an aboydance after the death
of J. S. who was presented by a stranger
after the aboydance, upon which the King had
Judgment; This shall be tryed per pais. And
for this Reason, in pleading of Letters
Patents, the place need not be alledged,
where the Letters Patents were made, be-
cause the Defendant cannot plead nul tiel
Record, but must plead, non concessit, and
then the Jury shall come from the place where
the Lands lie. Vide li. 6. fo. 15. 1 Inst. 117.
260. Plo. Com 231. But upon a Non
est factum pleaded to a Deed, there must
be a place alledged where the Deed was
made, because (though the Deed, as to
the matter of Law, be tryable by the
Court, yet the sealing and delivery there-
of, and other matter of fact, must be try-
ed by the Jury; so that in this case of a
Deed, there is a Tryal per Pais, and by
the Court. 1 Inst. fol. 35. vide apes 18.

The

The issue upon an Indictment of acquittal upon this shall be tryed by the Record. So shall the allowance of a Protection in Bank. The imprisonment upon the execution, and not for other cause, in escape. The justification of an imprisonment, because he is a Justice of Peace. A Statute Merchant, Count or not Count, Baron of the Parliament, or Vicount or not. Whether a place be within the Ligeance of the King of England, or in Scotland. A Fine for release, Rendering his body in discharge of his Bail, shall be tryed by the Record. Rolls iir. Tryal 574.

What issues shall be tryed per Record.

But in escape against the Mayor of A. Staple for suffering J. S. in execution upon a Statute Staple to go at large, if the Defendant say he was not in Prison upon the execution, but upon a Plaint there, this shall be tryed per pais and not per Record, because 'twould be unreasonable that the Defendant should certify a Record, where he himself was concerned. ibid. The time of inrolling Letters Patents shall be tryed per pais. Co. Lib. 4. 71. 9 H. 7. 2.

What per Pais

Disseisin of an Office in any Court, or Office Raising a Record in any Court, by the Filizers and Attorneys of the Court.

Office Raising a Record.

Peers.

8. A Peer of the Realm, i. e. a Lord of the Parliament, shall upon an Indictment of Treason, or Felony, misprision of Treason, and misprision of Felony, be tryed by his Peers without Oath, 1 H. 4. 2. But in an Appeal at the Suit of the Party, he shall be tryed per probos & legales homines Juratores. 10 E. 4. 6. &c. because that is not the Kings Suit, but the Parties. Vide li. 9. 31. Le case del Abbot de Strata Mercella. And in a Præmunire, his Tryal shall be per pais. Holtr. 1. part. 198. Dutchesles, Countesses, or Baronesses, although married, shall be tryed, as Peers of the Realm are, but so shall not Bishops and Abbots. Stam. 153. 20 H. 6. 9. 2. Inst. 48, 49, 50. 156. b. 294.

12 Rep. 53.
Lamb. In t.
520.3. Inst. 30.

Customs of
Courts, &c.
tryed by the
Judges.

9. The Customs and usages of every Court shall be tryed by the Judges of the same Court, if they are pleaded in the same Court, ib. and many other things are tryed by the Judges, as the reasonableness of a fine of an offender or upon surrender of a Copp-hold Estate; and so it is of Customs, services, and also of the time that a Tenant at will shall have to carry away his Goods: And these Cases come under the Rule, which makes matter of Law to be tryed by the Judges; Vide 1 Inst. fol. 56. And in some Cases matter of fact shall be tryed by the Judges, as if the Plaintiff
ap.

appear by Attorney in Court, and then the Defendant pleads that the Plaintiff is dead; If one appears, and saith, that he is the Plaintiff, whether he is, or not, shall be tryed by Inspection. the Judges, li. 9. 30. So the non-age of an Infant, generally by inspection of the Court. But in many Cases, Infancy shall be tryed per Pais, as if an Infant appear by Attorney, in Error, this shall be tryed per Pais, li. 9. 31. and so it is in an Estate probanda.

v. Bulst. 1 part
131.
Rolls tit. Try-
als 573.

Maihim, in an Appeal of Maihim the Court may adjudge this upon the view, at the prayer of the Defendant, and this Tryal is peremptory to the Parties, by a Jury of Chirurgeons. Vide Rolls tit. Tryal 578.

Maihim.

Maihim may be tryed again by the Court, by inspection for increase of Damages but then these things are to be considered, First, it must be a Maihim, and not a bare wounding. Secondly, The Maihim must be ascertained in the declaration, so as that it may appear that the Maihim inspected, and the Maihim in the declaration be all one, as was resolved Mich. 21 Car. 2. B. R. in the Case of Bidwel and Burford, the principal Case of which was, that the Defendant whip'd the Plaintiffs Horse, which made him throw her, and another Horse trod on her, and main'd her hand, and adjudged no increase of Damages in that Case,

Maihim.

Case, being a Consequential, and not a direct Maibim.

Inspection.

Ponage in a Writ of Error to reverse a Judgement or a fine of the Tenant by rescit, of one bouché come deins age, & issint praié le paroll à demurrer, **Ponage** sur aid praié, in Appeal, Audita querela, to avoid a Statute Accompt, and in all actions where 'tis prayed that the paroll demurroit, **Ponage** shall be tryed per Inspection. But in accompt against one of full age, if he plead **Ponage** when he was Bayly, this cannot be tryed by inspection. Rolls iii. Tryal 572. how this Tryal by inspection shall be, vide Rolls ibid. at large.

In all Cases where the matter may be tryed by inspection, examination or discretion of the Justices, if they doubt the matter, they may refuse to try this, and compel the Parties to a Tryal per pais, or other proofs 21 H. 7. 40. per tous Justices.

Tryals by
Witnesses and
proofs.

10. There are many Tryals allowed by the Common Law, by Witnesses only, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses,

nesses, 1 Inst. 6. and Divers other things v. 4. Inst. 278.
must be tryed by examination of the parties
and Witnesses, as the Tryal by Wager of
Law, &c. Finch 423.

Ponage was anciēdly tryed by the Verdict of Eight men, but now by inspection,
and Fullage by Twelve men. *Glarvill lib. 13. cap. 18.*

In an Appeal by a Feme of the death of
her Husband, if the Defendant say that
the Baron is alive in another County, or
generally, that he is alive, this shall be
tryed per proofs. 41 Assise 5. Vide Rolls tit.
Tryal 577. what shall be tryed by proofs in
an Assise, and what not. *Appeal.*

In a Writ of Annuity if the Defendant
say the Party is dead in Britain, this shall
be tryed per proofs. 26 E. 3. 70. *Annuity.*

1. Duke or no Duke, Earl or no Dukes, &c.
Earl, Baron or no Baron, shall be try-
ed by the Kings Writ. lib. 5. 35. lib. 6.
53. But Duches or no Duches, &c. by
marriage, shall be tryed per pais, because
the marriage is matter of fact.

12. In a Plea del alien nec, the League
between the King, and the Soveraign of
the Alien, shall be tryed by the Record of
the Chancery, for every League is of Record.
lib. 9. 32. *League.*

Mannor.

13. If a Mannor be ancient demesne, or not, it shall be tryed by the Book of Doomeday, which is in the Exchequer. But whether certain Acres be parcel of such a Mannor, or no, it shall be tryed by the Country. ib.

Courts not of Record.

14. The proceedings of a Court, which is not of Record (as the County Court, the Hundred Court, the Court Baron, &c.) shall be tryed by the Country, and not by the Rolls of the Court, because they are no Record. ib. Co. Lit. 117. b.

By Charters and Records.

The Priviledges and Liberties of Courts of Record, Cities, and Boroughs must be tryed by their Charters and Records.

Wills and Administration.

15. Whether the Ordinary committed Administration to the Plaintiff, or whether the Testament was proved before the Ordinary, or whether such a Will be the Will of the Party, or whether he dyed intestate, or not? In all these Cases, the Tryal shall be per pais, because probate of Wills, and constituting Administrators, did not belong to Ecclesiastical Judges originally, but were given to them of late. But the tryal thereof is left to the Common Law, and was not given to them. lib. 9. 32. 40.

An Executor brings an Action of Debt, the Defendant pleads that the Testator never

never made him Executor, if the Plaintiff gives in evidence the Probate of the Will, the Defendant shall only give evidence in Disaffirmance of the Plaintiff's Probate, which is matter of Fact; but as to matter of Law the Court gives credit thereto, as where another Will was made, for there the parties might have appealed, but if the Seal be Counterfeit, or the Probate forged, its Tryable per Jury, Adj. Pasch. 20. Car. 2. B. R. Noell and Wells. v. Wentworth's Executor. 69.

The Tryal of all Criminal matters is by the Country, and the party accused cannot be denied it, unless it be his own fault, as where he is mute, and will not put himself upon his Country, in due time, for then without further tryal Judgment de pain soit & dure is passed by the Judges upon him, Stamf. Pl. Coron. 150. Criminal matters.

16. In an action upon the Case for calling one Bastard, the Defendant justified that the Plaintiff was a Bastard; And it was awarded that this should be tried per pais, and not by the Ordinary, Hob. 179. Devant. 6. And so a Plea that the Plaintiff was born at such a place before marriage, this is Special Bastardy, and shall be tried per pais. Plo. 14. Dyer 89. vide hic cap. 22. Plo. Com. 267. Special Bastardy.

Customs of
London.

17. When an issue is taken, whether a Custom or no Custom in London, If the Mayor, Commonalty, and Citizens be parties, or interested in the Action, This Custom shall be tryed by a Jury, and not by the Certificate of the Mayor and Aldermen, by the Recorder. Hob. 85. Day and Savadges Case, Devant. 3. Stiles 137. Moor 871. vide apud iii. Vince. Rolls iii. Tryal 579, 580.

The Custom of London shall be certified by the Mayor and Aldermen, by the mouth of the Recorder. Co. Lit. 74.

In an information upon the Statute 5 Eliz. for using a Trade, to which the Defendant was not bound Apprentice, If the Defendant plead a Custom of the City, that he who is free of one Trade, may use any other; This shall be tryed by the mouth of the Recorder.

Note this difference, He that is free of one Manual Trade cannot use another Manual Trade: but it is otherwise of those Trades which are not Manual. In such, one that is free of one, may use another by the Custom.

Liberties claimed by Custom in London, the Custom of making Indentures of Apprenticeship void, if not Inrolled within a year, The Custom to devise Lands, Foreign

Foreign Attachment, &c. shall he tryed by the mouth of the Recorder. But the Issue whether there be a Market every day of the week in London shall be tryed per pais, because the issue is not upon the Custome. Rolles tit. Tryals 580. vide hic cap. 8.

18. A matter of Record being mixt with a matter of fact, shall be tryed per pais, and not by the Record. Hob. 244. Peter and Sinfords Case. Devant. 7. Matter of Record, mixt with matter of Fact.

19. In Writs of Right, and Appeals that touch life, Tryal may be by Battel, or by Jury, at the Defendants choice; The Battel, in a Writ of Right, must be by Champions, (who must be Freemen,) But in an Appeal, it must be in proper person. The Champions, in a Writ of Right are not bound to fight longer than until the Stars appear; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right: and the Judges of the Kings Bench in an Appeal of Felony. It seems they seldom, or never killed one another in this tryal of Battel, for their Weapons were but Batons, and he that was vanquished, was presently upon Proclamation made to acknowledge his fault, in the Audience of the people, or else to cry Craven in the name of Recreantise, &c. and upon Tryals by Battel.

Writ of Right.

Tryals per pais.

upon this, Judgement was to be giben, and after this the Recreant should amittere liberam legem, that is, should become infamous, &c. 2 Institutes 247. Finch. 421. lib. 9. 31. Mirror of Justice 161, 162, &c. 1 Inst. 294.

Grand Assise.

Glanvil saith, the tryal by Grand Assise came by the Clemency of the Prince. Est autem (saith he) Magna Assiza Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.

For the Tryal of Treason, Murder, and Felony as well upon Appeals, as upon Indictments, see Stamford's Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth the tryal of these Crimes by the old Law, was this; If there were no direct proof, nor accuser, or if there was any accuser, or direct proof, yet if the party denyed the same, then the tryal was by Wager of Battel, if the party accused was not 60 years old, and of sound Limbs; but if he was older, or not sound, then he was to be tryed per judicium Dei, namely, per calidum ferrum vel aquam, that is, if he was a Freeholder, he was to run bare foot, and bare legg'd ower a row of hot Iron Barres, and if he passed three times without stop or fall, he was acquitted. And if he

Per judicium
Dei.

Tryals per pais.

32

he was a meaner person, called Rusticus; he was to run through vessels filled with scalding water.

20. In a Writ of Disceit, upon a Recovery by default, the Tryal shall be, if the Judgment was given upon the Petit Cape, by the Summoners, if upon the Grand Cape, by the Summoners pernors, or veiors, and not per pais; So if a Recovery by default in a real Action be pleaded, to which the other saith, Nient comprise, this shall not be tryed per pais, but by the Summoners and Veiors. lib. 9. 32.

Recovery by default.
Summoners
pernors,
veiors.

Nient Com-
prise.

En Assise if the issue be, whether the Land was extended in an Elegit, &c. This shall be tryed by the extendors sworn with the Assise. 31. Ass. 6. vide Rolls tit. Tryal 581, 582.

Of Tryals per L'eschear, per Examination, vide ib.

In an Appeal, if the Crigent be awarded, and the party pray a Writ to inquire of the goods and Chattles, and to seile them, this may be awarded to the Escheator, or Sheriff at the Election of the Court. 41. Ass. 13. vide hic cap. 24, 27.

Escheator
Sheriff.

21. In debt upon a simple Contract, De wager of
tinue, &c. The tryal may be by Wager of Law.
Law,

Law,

Tryals per pais.

Law, or per pais, at the Defendants Election. But when the Defendant wageth his Law, he ought to bring with him Eleven of his Neighbours who will avow upon their Oath, that in their Consciences he saith true, as he himself must be sworn de fidelitate, and the Eleven de credulitate. 16. Finch 423. and 1 Inst. 295. you may read excellent Learning concerning this Trial.

Profession.

22. If Profession be denied, it shall be tried by the Court Christian; But if the time of the Profession be in issue, this shall be tried by the Country. lib. 4. 71. So

Inrollment.

though an Inrollment, or other matter of Record, cannot be tried per pais, yet the time when the Inrollment was made, may be tried per pais. So whether the party

Appearance.

appeared in such a Court, or on such a day, &c. shall be tried per pais. Cro. 3.

Sheriff.

part. 131. So whether one was Sheriff such a day or not. Cro. 1. part. 421. Admission,

Admission,

&c.

Plenary.

Institution, Plenary, and Ability of the Parson, shall be tried by the Bishop. But In-

duction shall be tried by the Country, and so shall Absolvance by resignation. Dyer 220.

Moor 61. And bond, or not bond shall be tried per pais. 1 Inst. 344. And Plenary, if the

Clerk be dead, Mirror of Justice 324. ll. 6. 49. The cause of refusal of a Clerk by the

Bishop, shall be tried by the Metropolitan, if the Clerk be living; but per pais, if he be

dead. 1. 5. 58.

Ability

Ability shall be tryed by the Ordinary, if the Clerk be alive, but if dead, then per pais. *Per spiritual Law.*
 Institution, resignation, full or not full; *Vide hic cap. 15.*
 Profession, unless alledged in a Stranger.
 Priory removable at will, or perpetual general Bastardy, the Right of Espousals, Divorce, &c. shall be tryed by the Bishops: but in many cases, these matters being mixed with other circumstances, shall be tryed per pais.

As if the Church be void by Resignation, or void or not void, Induction, Institution and Induction together, because the Common Law shall be preferred, Priory or not Priory. *Per pais.*
 For although Institution, resignation, &c. are spiritual, yet avoidance, induction &c. are notorious to the Country.

Bastardy alledged in a stranger to the writ, or in one dead, or Abatement of the writ. Whether a feme, be a feme covert in possession, &c. in trespass by Baron and feme, Nient Son feme shall be tryed per pais. And see in Rolls tit. Tryal 584. &c. Many cases where Bastardy, Marriage, &c. shall be tryed per ley spiritual, or per pais. The time &c. of Consecration of a Bishop, and of other spiritual matters, shall be tryed per pais. By what spiritual person the tryal shall be, and for what cause. vide ib.

Ideoty.

23. An Ideot, found so from his Rattidity by Office, may come in person in the Chancery, before the Chancellor, and pray that before him, and such Iustices or Sages of the Law, which he shall call to him (who are called the Council of the King), he may be examined, whether he be an Ideot, or no; or by his friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery. Ibidem Coram nobis, & concilio nostro examinand. lib. 9. 31.

Sheriff:

Return.

24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: If whether the Undersheriff made such a Return or not, it shall be tryed by the Undersheriff; If the question be, whether such a one be Sheriff or not, he is made by Letters Patents of Record, and therefore it shall be tryed by the Record. ib. Cro. 1. part. 421.

Dures.

25. If an Approver say, that he Comenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, ib. Corone br. 75.

Statute.

26. The Tryal, whether a Statute shew-
ed before, be the true Statute or not, shall
be by the examination of the Mayor, and
Clerk

Clerk of the Statutes, which took the Statute, and not per pais, ib. Whether a Statute hath two Seals or not, shall be tryed per pais, Leon. part. 228, 229.

27. In Assise the Tenant said, that the Lands were taken into the Kings hands, this shall be tryed by the Examination of the Escheator.

28. If one in avoidance of an Out'awry, Certificate. alledge that he was in Prison at Burdeaux, ultra mare in servitio Majoris de Burdeaux, this shall be tryed by the Mayor's Certificate; and in such like Cases, other Tryals shall be by the Certificate of the Marshal of the Host, and by the Captain of Calice, and also by Messenger. Messenger.

29. At the Petit Cape, the Tenant said that he was imprisoned 3. days before the default, and 3. days after, this shall be tryed by the Examination of the Attorney; Nient Attach. per 15. Jours in Assise shall not be tryed per pais, but by examination of the Bayley. Bayley. ib.

30. It seems an Almanack is so infallible, that it hath counterbailled the Clerdict of a Jury. For in Error of a Judgment given in Lynne, the Error assigned was, that the Judgment was given at a Court held there on the 16th day of February, 26 Eliz.

and that this day was Sunday, and it was so found by Examination of the Almanacks of that year: upon which it was ruled, that this Examination was a sufficient Tryal, and that a Tryal per pais, was not necessary, although it were an Error in Fact; and so the Judgment was reversed. Cro. 3. part. fo. 227. 1 Leon. 242. the same Case, and there it was said, it was twice so ruled before.

Ordeal.

31. In ancient times there was a tryal in Criminal Causes called Ordaliū, for upon Not Guilty pleaded, the Defendant might put himself upon God and the Country (as is the use at this day) or else upon God only; and then if he was a Freeman, he was to be tryed per ignem, that is, he was to pass over Novem vmeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned: and this was called Judicium Dei; But if he was a slave, then his tryal was to be per aquam, and that divers ways, which all appear in Lambard, verbo Ordaliū. From which kind of tryal, I presume we still retain this expression of an innocent person, That he need not fear fire or water: this manner of tryal was first prohibited by the Canons, then by Parliament: The tryal by Battel is likewise prohibited by the Canons, but not by Parliament, as you may read in the ninth Report, fo. 32. and

Battel.

and in the authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the authorities cited in that Book, which will avoid prolixity.

32. When the matter alledged, extendeth to a place at the Common Law, and a place within a Franchise, it shall be tryed at the Common Law. 1 Inst. 125. 4. Inst. 221. Which Tryal shall be first.

In what Cases a Tryal in one issue shall bind the same party in another issue, upon the same matter. Tryal in one issue binds in another.

In Debt against two per several Precipes, if one plead a release, and they are at issue upon the Deed, and the other plead the same issue, if it be found the Deed of the Plaintiff in the former issue, this shall bind him in the second issue, 12 H. 4. 8.

In trespass if the Defendant Plead villenage in the Plaintiff, if this be found against the Defendant, this shall bind him in the same issue, in another action in the same Court betwixt the same parties. 44. Ass. 5.

If a man be found guilty of a Conspiracy upon an Indictment at the Kings suit, this

this shall not bind in a Writ of conspiracy at the suit of the Party, but he may plead not guilty. 27. Aff. 13.

If a man upon an Indictment of extortion confess it, and put himself in the Kings grace and makes fine, &c. this shall bind him, and he shall not plead not guilty to the suit of the party, for a confession is stronger than a Verdict. 27. Aff. 57. per Sbarde. vide Rolls tit. Tryal 625.

In what Cases
tryal against
one shall be
against others.

He which is not party to the issue nor can have attain, or challenge the Inquest, shall not be bound by the Tryal. 11. H. 4. 30.

And therefore in Trespas against two, and one pleads a Release, and the other justifies as his Servant; If the issue be found against the Master, it shall not conclude the Servant. 11 H. 4. 30. Rolls ib. 625.

At what time
the Tryal shall
be.

One shall not be compelled to try a traverse the same Sessions he makes it, for a man shall have time to make his defence, and is not supposed to be ready to answer sudden objections, and for this reason many Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace cannot inquire and determine the

the same day. But Iustices of Gaol Delivery, and Iustices in Eyre may.

Iustices of Peace cannot proceed to the delibery of a person indicted of Felony before them, the same day he is arraigned. 22 E. 4. Coron. 44. Declared by all the Iustices of England, to be observed as a Law.

In an Indictment in B. R. or in the same County and removed thither, the Defendant may be arraigned and tryed the same day. For the Kings Bench is a Court of Eyre for all Offences in that County. Or otherwise of an Indictment removed out of another County. Vide Rolls in. Tryal 626. many Cases de ceo.

33. All matters done out of the Realm of England, concerning War, Combate or Deeds of Arms, shall be tryed and terminated before the Constable and Marshall of England, before whom the Tryal is by Witnesses, or by Combat, and their proceeding is according to the Civil Law, and not by the Oath of Twelve men, 1 Inst. 74. 261. Wherefore if the Kings Subject be killed by another of his Subjects in any Foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Constable and Marshall, who sentence upon the testimony of Witnesses or Combat. ib. So if a man be wounded in France, and dye thereof in England. ib. 4. Inst. 140.

Marshal Affairs.

Witnesses or Combate.

It

What Issue
shall be first
tryed.

Latch. 4.

Damages.

It is worthy our obserbation, to take notice when there are seferal issues, which of them shall be first tryed; And for this you have already heard, that where issue is joynd for part, and a Demurrer for the Residue, the Court may direct the Tryal of the Issue, or judge the demurrer first, at their pleasure, though by the opinion of Dodrige, It is the best way to give Judgment upon the Demurrer first, because when the issue comes afterwards to be tryed, the Jury may assess damages for the whole.

A Scire facias was brought on a Recognizance in Chancery, the Terrestenants pleaded seferal Pleas, the Plaintiff demurred to one, and took issue on the other, the Record was sent into B. R. to try the issue, and it was tryed, and Verdict pro Plaintiff, the demurrer not being argued, and it was adjudged per R. B. that Judgment ought to be given on both by that Court, Jeffreyson and Dawson's Case Hill. 21, 22 Car. 2. B. R. vide for these things 1. Roll. abr. 534, 535. Roll. rep. 287. and in the principal Case, 4 Inst. 80. was denied to be Law.

Immaterial issue.

An Immaterial issue joynd, which will not bring the matter in question to be tryed, is not helped after Verdict by the Statute of Jeofailes, but there must be a Repleader; because this is matter of substance; for if there were no issue, there could be no Verdict,

dit, and so it is as if nothing had been done in the cause.

In an Action against two, the one pleads in abatement of the Writ, the other to the Action; the Plea to the Writ shall be first tryed, for if that be found, all the whole Writ shall abate, and make an end of the business; for the Plaintiff ought not to recover upon a false Writ. *1 Inst. 125.*

Plea to the Writ.

In a Plea personal against divers Defendants, the one Defendant pleads in bat to parcel, or which extendeth only to him that pleaderth it: And the other pleads a Plea which goeth to the whole: the Plea, that goeth to the whole, (that is) to both Defendants, shall be first tryed, because the other Defendant shall have advantage thereof; For in a personal Action, the discharge of one, is the discharge of both.

Plea to the whole, first tryed.

As for example, if one of the Defendants in Trespass, pleads a Release to himself (which in Law extends to both) and the other pleads not guilty, (which extends but to himself;) or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all: And the other Defendant shall take advantage herof, because the discharge

Release.

Rolls tit. Try. al 628.

f

charge

Discharge of
one discharg-
eth both.

charge of one, is the discharge of both. But in a Plea real it is otherwise, for every Tenant may lose his part of the Land; as if a Praecipe be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as *Wastard* in the Demandant, and it is found for him, yet the other issue shall be tryed; for he shall not take advantage of the Plea of the other, because one Joyntenant may lose his part by his misplea.

Brown and Stamford Justices, consulted with *Grammarians* in things of Grammar; and *Hulls a Batchelor of Law* (Tempore Hen. 6.) was called into Court, to shew the difference between precise and causative Compulsion. Vide *Plow. 122. 127. 128.*

Pasch. 16 Car. 2. B. R. An action of Trover, &c. was brought de sex Capitis libris fibularis, Anglice 6 laced Coifs; after Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the Latine words were both Adjective, and so not certain: but it was answered, that Capaital is a Substantive, and the Nomenclator of Westminster School was produced to warrant it, and it was adjudged for the Plaintiff accordingly, and the Court allowed that authority before *Rider's Dictionary*.

C A P.

C A P. III.

Of a *Venire facias* ; To whom it shall be directed ; when to the Sheriff, when to the Coroners, when to Essoirs, and when to Bayliffs. When well awarded. &c.

HAVING given you the Epitome of what Tryals are allowed by the Common Law, and what shall be tryed per pais, and what not ; we shall now apply our selves more particularly to the Tryal by Juries : And because a *Venire facias* is the foundation and *Causa sine qua non*, of a Jury, (I mean in Civil Causes ; for in Criminals, as upon Indictments, the Justices of Gaol Delivery, give a general Command to the Sheriff, to cause the Country to come against their coming ; and take the Panels of the Sheriff without any process directed to him ; yet process may be made against the Jury, though it is not much used. Stamford, Plees del Corone, 155.) I will first recite the Writ, in terminis, the rather, because I intend to order my Discourse, according to the method of the Writ.

Venire facias.

Rex &c. Vic. B. Salutem. Precipimus tibi quod venire facias coram Justiciariis nostris de Banco apud Westm. tali die, duodecim liberos & legales homines de vicinet. de C. quorum quilibet habeat quatuor libras terre, tenement. vel reddit. per annum ad minus, per quos rei veritas melius sciri poterit; Et qui nec D. E. nec F. G. aliqua affinitate attingunt; At faciend. quandam Jur. patrie inter partes predict. de placito, &c. quia tam idem D. quam predict. F. inter quos inde contentio est, posuer. se in Jur. illam. Et habeas ibi nomina Jur. illorum & hoc breve. T. &c.

This is one of those Latine Letters, (as Finch terms them, fo. 237.) which the King sends with Salutation to the Sheriff. But withall Commands him, that he cause to come twelve free and lawfull men of his County, to resolve the question of the fact, in dispute between the parties, upon the issue; and it is a Judicial Writ, issuing out of the Record, for Plaintiff or Defendant, after they have put themselves upon the Country: for upon the words *Et de hoc ponit se super patriam*, by the Defendant, *De*, *Et hoc petit quod inquiretur per patriam*, by the Plaintiff, and issue joyned thereupon, the Court awardeth the *Venire facias*, vid. *Ideo fin inde Jurat.*

And

And if they come not at the day of the Writ returned, then shall go forth against them, an Habeas Corpora, and Distringas to bring them in to try the matter. The which two last Writs are usually made with this clause, Nisi prius Justiciarii venerint, &c. and are returnable after the time of the Judges coming their Circuit.

And first, you see it is directed Vicecomes Sheriff. *mi*, i. e. to one who is Vicecomes, and hath the Regiment of the County, instead of the Earl of that County, to whom once it did belong: as we are taught in the Mirror, Chap. 1. Sect. 3. scil. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties. And when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vicecomites.

What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 Inst. 168. that he is Sheriff, that is, præfectus Comitatus, Governour of the County; For the words of his Patent be, Commisimus vobis Custodiam Comitatus nostri de, &c. And he hath a threefold Custody, triplicem Custodiam, viz. first, Vitæ Justitiæ, for no Suit be,

What trust in the Sheriff.

begins, and no Process is serbed but by the Sheriff. And he is to return indifferent Juries for the tryal of mens Lives, Liberties, Lands, Goods, &c. Secondly, *Vita Legis*, he is after long Suits, and chargeable, to make Execution, which is the life and soul of the Law. Thirdly, *Vita Reipublicæ*, he is *Principalis Conservator pacis*, within the County, which is the life of the Commonwealth, for *Vita Reipublicæ Pax*.

To whom the
Venire facias
ought to be
directed.

Coroners.

Fortescue,
cap. 2. 5.

Esliors.

Challenge.
Sheriff of
London.

Yet notwithstanding the height and Latitude of this great Officers power and trust, the Law adjudges him in many cases not capable to do so much as return a Jury; For if he be of kindred by nature, or of affinity by Marriage to any of the parties, or (that I may say all in a little,) if he be not as indifferent almost in all respects as he is whom the Law allows to be a Juror, he ought not to meddle with the retorning of the Jury. But the *Venire facias* shall be directed to the Coroners, (or to some of them, if the residue are not indifferent) who in that case are *hac vice*, *Vicecom*. And if the Coroners are not indifferent, then the *Venire* shall be directed *Ad 2 Electores*, that is, to two whom the Court shall chuse and deem fit to retorn the Jury; And to the retorn of these Elisors or Esliors, *ab Eligendo*, no Challenge will be admitted. Bro. tit. *Venire facias* 14. as to the Array; but to the Polles, 1 Inst. 158. If one of the Sheriffs
of

of London be a party, then the Venire may be directed to the other Sheriff; if the Under-Sheriff be a party, yet the Venire may be directed to the Sheriff, with this Proviso, *Quod Sub-Vic. tuus in nullo se intromittat cum executione istius brevis.* 18 E.

4. 3.

Judicial Writs (say Cook and Sanders, Suggestion. Plo. 74.) may be directed to the Coroners;

As the Venire facias, where the parties Of whom.

are at issue; there, upon the surmise of the Plaintiff, that the Sheriff is his Cousin, and upon prayer that the Venire Coroners.

be directed to the Coroners, for avoidance of his own delay that might happen by the challenge of the Array, The Defendant shall be examined whether it be true, or not, and if he confesses it, then the Venire shall be awarded to the Coroners; for then it appears to the Court by the Defendants confession, that the Sheriff is not indifferent; But if the Defendant denies it, then the process shall be awarded to the Sheriff, because the Sheriffs Authority and profit shall not be taken away, without cause apparent to the Court; But if the Defendants will alledge So in Ejectment against four upon Affinity of the Sheriff to one of the Defendants. Rolls tit. Trial 668. Examination.

any such matter, and pray a Venire facias to the Coroners, there the Plaintiff shall not be examined, neither shall such allegations be allowed, because delays are for the Defendants advantage, and the Defendant may Challenge the Jury Not of the Defendants Suggestion.

for The Defendant may not have a Venire facias to the Coroners.

for this cause, and so is at no pre-
judice.

And see in term. Hil. 3H. 7. fo. 5. placit.
ult. In a quare Impedit, where the Defen-
dant knew how the Sheriff was Cousin
to the Plaintiff, and prayed a Writ to the
Coroners, but it was denyed him upon the
same Reason. Fitz. iii. suggestion placit. 8.
Br. Challenge 153.

In the Lord Brook's Case Trin. 1657.
B. R. In Ejectment, the Court was moved,
that Lord Brooks might be made Elisor,
which was granted; then the Court was
informed that the Lessor of the Plaintiff
was High Sheriff of the County, and that
the Coroner was Under-Sheriff, and it
was prayed that Elisors might return the
Jury; but the Court would not grant it
at the prayer of the Defendant, though
the Plaintiff offered to agree to it, it be-
ing in a Tryal by Nisi prius: but had
it been in a Tryal at Bar, they would
have granted it. But the regular course is,
for the Plaintiff to pray it, or else the De-
fendant may challenge the Array at the Al-
lises; for it's a principal challenge, that the
Lessor of the Plaintiff is High Sheriff, or
of kindred to the Sheriff, for which
see Hutt. 25. More 470. Rolls rep.
328. And it was so adjudged, Trin. 15 Car.
2. B. R. Duncomb and Ingleby, that it is a
principal challenge. In

In Ejectment, the Plaintiff suggested that he and one of the Coroners, were all of the Liberty del Countee Wigorn', and prayed a Venire facias to the other Coroner; although this is no principal challenge, and the Defendant might have opposed the prayer, yet because he confessed it, the Award was well to the Coroner. So if the cause be that one of the Coroners be retained of Counsel with the Plaintiff. If the suggestion do not comprehend a principal challenge, but only of favour, this is not sufficient to award process to the Coroners; but if it be a principal challenge, as affinity, &c. if the Defendant confess it, the award shall be to the Coroners; if he will not confess it, then to the Sheriff; and in such case the Defendant shall never challenge the Array for that cause: so if the Plaintiff pray process to the Coroners for favour in the Sheriff, if the Defendant say that this is not favourable, he shall never challenge for favour unless de puisne temps.

For what causes Process shall be directed to the Coroners.

If the Array be quashed because made by the Sheriffs Minister, who was aiding and of Counsel with one of the parties, yet the Writ shall not be directed to the Coroners, but to the Sheriff, commanding him to make the Panel by another Officer. As, Ita quod the Sheriff ne se intromittat, &c.

If the Tales be quashed for affinity in the Sheriff, but not the principal Pannel, because 'twas made before the affinity, yet all shall be awarded to the Coroners, Scil. the Distringas of the principal Pannel, and that they return a new Tales, for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for affinity in one, &c. Yet the Process shall still go to the Coroners, Ita quod the Coroner se non intromittat.

To whom
Process shall
be directed
for default in
the Sheriff
and Coroners.

If Default be in the Sheriff and Coroners, the Court may choose two Esliors, and if the parties can say nothing against them, they shall make the Pannel.

But the Distringas shall not be directed to Esliors, for the Court cannot make Officers to distreyn the Kings Liege people, but the King may. 3 H. 6. 12. dubitatur.

Process may be directed to the Justices of Assise, by assent of parties, not without. When a Pannel is made by the Esliors, they shall afterwards serve all Process that comes upon this, as the Sheriff should. 15 E. 4. 24. 18 E. 4. 3, 8. Rolls tir. Tryal 670. For it may be the Sheriff will distreyn only those who are his friends, and be partial.

When

When the Process is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who is indifferent, yet the Process shall not rebert, but continue to the Coroners pendant le plea. 14 H. 7. 31. Bro. tit. Venire facias 17. So the Entry is, Ita quod Vicecomes se non intromittat. 18 E. 4. 3. 8 H. 6. 12.

Venire facias once directed to the Coroners, shall not be to the Sheriff afterwards.

And therefore where the Sheriff ought not to return the Venire, he cannot return the Tales. For in Error in the Exchequer Chamber of a Judgement in the Queen's Bench, the Error assigned was, because the Venire facias was awarded to the Coroners, for Consanguinity in the Sheriff; and it was returned by the Coroner, and afterwards a Tales was awarded, and it was returned by the Sheriff, and it was tryed, and a Verdict given, and Judgement. And for this cause held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgement was reversed. Cro. 3. par. 574. Bro. tit. Ocho. Tales 9.

Sheriff shall not return the Tales, where he cannot the *Venire facias*.

I will instance one Case more in the same Reports, fo. 586. because it is very full in the point. After issue in Trespass, the Plaintiff for his expedition surmised, that he was Serbant to the Sheriff, which being confessed by the Defendant, the pro-

Where the
Coroner re-
turns the *Ve-
nire facias*, he
ought to re-
turn the *Tales*.

No name to
the Return.

cess was awarded to the Coroners, and after Verdict, it was moved in Arrest of Judgement, that the *Tales de Circumstantiis* was awarded, and returned by the Sheriff; which was held by the whole Court to be good cause for Staying the Judgement: For it is a mis-trial, not aided by any of the Statutes; for process being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other man. And process ought always to be returned by him, who is an Officer by Law to return it, otherwise it is merely void. But afterwards upon view of the Record, it appeared that the *Tales* was returned by the Coroners, and their names annexed thereto, wherefore it was without further question. But the Court said, if their names had not been annexed to the *Tales*, yet it had been well enough; for they be annexed to the first Panel. And it shall be intended that the right Officer return'd it, and the usual course is, That to such *Tales* there is not any officers name subscribed, and yet it is good enough; for it is not within the Statute of York, which appoints that the name of the Sheriff should be subscribed; but it was moved, that the Record of the *Postea* is, that the *Tales* were returned by the Sheriff; But the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgement.

But

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroners, de puisne temps, the party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Eschors, & sicè converso.

Venire facias to the Sheriff, after one awarded to the Coroners.

In Error of a Judgement in Chester, the parties being at issue, a Venire was awarded to the Sheriff. And at the day of the Return, it was entred Quod Vicecomes non misit breve. And then the Plaintiff prayed a Venire facias to the Coroners, for Cozenage betwixt him and the Sheriff, which was awarded accordingly; and at the day of tryal, the Defendant made default, and there upon Judgement, Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de puisne Temps; sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was not material. Cro. 3. part. 853.

Venire facias to the Coroners, after one to the Sheriff.

But the Defendant might have demurred to this prayer; For if the Plaintiff pray a Venire facias to the Sheriff, he shall not chal-

No *Venire facias* to the Coroners, after one to the Sheriff.

challenge the Array nor have a Venire afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal challenge, whereof he might by common intendment have Conusance, when he so prayed the Venire facias; for upon shewing this Cause at first, he might have prayed Process to the Coroners; but for a principal challenge, of which by common intendment the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the Array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H. 7. 9.

If the Defendant denies the Plaintiffs suggestion, he shall have no benefit of it by Challenge.

If the Plaintiff prays a Venire facias to the Coroner, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entered, and the Defendant shall not challenge the Array for this cause afterwards. Br. tit. Venire facias 21. and 23.

By Consent, the Venire facias may be directed to a wrong Officer.

Mistrial without such consent.

If a Venire facias be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong place, yet if it be per assensum partium, and so entered of Record, it shall stand, for omnis consensus tollit errorem. 1 Inst. 126. li. 5. 36. But if it be directed to the Coroners, where it ought to be to the Sheriff, without

out such consent of parties : This is an insufficient Tryal, not remedied by any Statute, except it be upon an insufficient suggestion, and then the Statute of 21 Jac. 13. helps it.

Upon suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff, or Defendant, or upon any other suggestion which contains a Principal challenge, the *Venire facias* may be directed to the other Coroners. Dier 367.

Error of a Judgement in Northampton, Bayliffs. because in Northampton the Court being held before the Mayor, and two Bayliffs, the *Venire facias* upon the Issue was awarded to the two Bayliffs, to return a Jury, before the Mayor and Bayliffs, secundum Consuetudinem : which being returned, and Judgement given, the Error assigned was, because the Bayliffs being Judges of the Court, could not also be Officers, to whom Process should be directed, there being no Custome that can maintain any to be both Officer and Judge. But all the Court (absente Hide) conceived it might be good by Custome. And that it is not any Error, for the Judges be not the Bayliffs only, but the Mayor and Bayliffs; and it is a common course, in many of the Antient Corpora-

Judge and
Officer to re-
turn Writs.

Corporations, where the Bayliffs are Judges, or the Mayor and they be Judges; yet in respect of executing Process, they be the Officers also. And one may be Judge, and Officer diversis respectibus, as in *Ho. disseisin*, the Sheriff is Judge and Officer: Whereupon Judgement was affirmed. Cro. 1 part. 138.

Venire facias
to the Garden
of the Palace
of Westminster.
Rolls tit. Try-
al 667.

In Trespas and Assault laid in the Court, to be at the Palace of Westminster, It was adjudged, that the *Venire facias* shall issue al Garden del Palace, and not to the Sheriff of Middlesex. Bro. tit. Ven. fac. 31.

Award of
Venire facias.

In Trespas against two, if one plead, and two issues are joyned upon his Plea, and two other issues are also joyned, and the Court award a *Venire ad triandum exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant*, &c. This is a good award, although there be several issues betwixt the Plaintiff and both Defendants, because that this word *Exitus* may be for all *reddendo singula singulis*. Hob. 91.

If an Inquest remain for default of Rapers, and a Decem Tales is awarded, and the Defendant saith for his delibe-
rante

rance that he is Lord of the Rape, where,
 &c. and that all there are within his
 distrels, and prays a Writ to the next
 Hundred; The Court may try this by *Prochein Hun-*
 Tryors presently, without a return of *dred.*
 the Sheriff, and if it be true may award
 to the next Hundred; otherwise if it be false.
 3 H. 6. 39.

D

CAP.

C A P. IV.

What faults in the *Venire facias* shall vitiate the Tryal, what not. When a *Venire facias de novo*, shall be awarded; when several *Venire facias*'s. When the *Venire facias* shall be betwixt the party and a stranger to the Issue; Who may have a *Venire facias* by *Proviso*, and when.

Venire facias
why the
Writ so cal-
led.

WE have now shewed you to what Officer the *Venire facias* shall be directed; The next step in the Writ is *Præcipimus tibi quod Venire facias*; Which words, *Venire facias*, are the most effectual words in the Writ, and therefore they give the denomination to the whole Writ. And here opportunity is offered us, to speak something of a *Venire facias* in general. I am not ignorant how our Books swarm with Cases which arise from the defects in this Process, and how that Merits have been set aside, Judgements stayed, and reversed, for want of suffi-

cient Returns, misawarding, disagreement
with the Writ, discontinuance, and ma-
ny other faults in this Writ. But the
Statutes of Jeofailes (especially the Statute
21 Jacob. cap. 13.) have pardoned (as I
may so say) these enormities; As, the
awarding this Writ, hab. Corpora, or Dis-
stringas to a wrong Officer, upon any in-
sufficient suggestion, or by reason the Visne
is in some part misawarded, or sued out
of more places, or of fewer places than it
ought to be, so as some place be right named,
The misnaming of any of the Jury, either
in Sir-name, or addition in any of the said
Writs, or in any return thereupon, so that upon
examination, it be proved to be the same man
that was meant to be returned; or if no Return
be upon any of the said Writs, so as a Panel
of the names of the Jurors be returned,
or annexed to the said Writ; or if the Sheriff
or Officers name, having the Return thereof,
is not set to the Return of any such Writ,
so as upon Examination it be proved that
the said Writ was returned by the Sheriff, or
Undersheriff, or such other Officer. In all
these Cases, the Judgment shall not be
Stayed, nor reversed for these defects.

Statute of
Jeofailes 21
Jac. 13.

But this Act doth not extend to any Writ,
Declaration, or Suit of Appeal of Felony,
or Murder, nor to any Indictment,
or Presentment of Felony or Murder, or
Treason; nor to any Process upon any of

Popular Action;
or, &c.

them; nor to any Writ, Bill, Action, or Information upon any popular, or penal Statute: Wherefore since Informations, and popular Actions are grown so frequent, the Attorneys, &c. herein had best beware of these Jeofailes.

Christian name mis-
taken in
the *Venire facias*, incurable.

By this Statute, many defects are remedied, which were not by the Statutes of 32 H. 8. Cap. 30. and 18 Eliz. Cap. 14. yet all are not; for this Act only helps the mis-naming of a Juror in Sir-name, or addition, and saith nothing of his Christian name: wherefore I conceive the Law in *Codwells Case*, in the fifth Report, remains as it was then; which is, that if a Juror be mis-named in his Christian name, on the *Venire*, though he be named right in the *Distringas*, and *Postea*, yet this is ill, and not amendable; and with this agrees *Goddards Case*, Cro. 2. part. 458.

Christian name right in
the *Venire facias*, & wrong
in the *Distringas*.

And since the Court (Cro. 1. part, fol. 203.) doubted thereof, I may well put the Question, if a Juror be right named upon the *Venire*, and mis-named in his Christian name, in the *Distringas*, &c. whether this is amendable, or not; without dispute, it is not by the Statute of 21 Jacob. for that only helps the Sir-name. But with Reberence to the Courts doubt, I conceive clearly, it is holpen by the Statutes of 32 H. 8. and 18 Eliz. as a continuance

continuance of Proceſs; and I may with the more confidence believe it, becauſe in Codwells Caſe aforeſaid, where in the Pannel of the Venire, a Juror was named Palus Cheale, and in the Diſtringas, &c. he was right named Paulus Cheale, and ſo becauſe he was miſ-named in his Chriſtian Name, in the Venire, Judgement was arreſted. But it is there adſudged, that if he had been well named upon the Venire, and miſnamed on the Diſtringas or Poſtea, then upon Examination, it ſhould be amended. But the Counteſſe of Rutlands Caſe, lib. 5. 42. is expreſs in the point, and ſo is Cro. 3. part. 860. Rolls 196. Teppet in the Venire and Tipper in the Diſtring. Amended. And ſo if the miſtake be in the Pannel Jurata, the Sheriff may come in Court, and amend it. And ſo if Samuel be in the Venire and Diſtringas, and Daniel in the Nomina Juratorum, upon examination, this may be amended. And ſo if the name be right in the Ven. and miſtaken in the Chriſtian name in the Diſtringas or Poſtea it is amendable. Rolls 197. And ſo if he be De A, in the Venire and Diſtringas, and De B. in the Nomina Juratorum, this is amendable.

And it is to be known, that in moſt Caſes, where the Venire facias, Hab. Corpora, or Diſtringas be defective, they are to be amended; but if the Palady be ſo fatal in the Venire, that it cauſes a miſ-tryal, (as in the miſtake of a Jurors Chriſtian Name, or where a Juror
not

*Venire facias
de novo.*

One Jury
shall not try a
cause twice.

not returned is sworn, &c.) then the Verdict is to be set aside, and a *Venire facias de novo*, to be awarded; and so was it to be upon those mistakes, (now amendable by the Statutes,) before the making thereof. And where a Jury giveth a Verdict which is accepted, and recorded by the Court, be the Verdict perfect or imperfect, the Jurors are discharged, and shall never try the same issue again upon a new *Nisi prius*. But if the Verdict be so imperfect, that Judgement cannot be given upon it, then the Court shall award a *Venire facias de novo*, to try the issue by other Jurors. li. 8. 65. Bulstr. 2 part. 32.

*Venire facias
de novo.*

If upon an issue all the matter be not fully inquired, a *Venire facias de novo* shall issue. 18 E. 3. 50.

In an *Audita Querela*, if the parties go to issue upon payment according to the defendants of the Statute, and this is found for the plaintiff, but the Jury do not assess Damages, the Court shall award a *Venire facias de novo*, to assess damages. 22 E. 3. 5. vide hic cap. 6. and Rolls tit. Tryal. 593. 595.

If the Record of the *Nisi prius* be *unum modum tritici* for *modum*, and the Plaintiff is Nonsuit at the Assize, for this mistake, if the Record in Court be right, scil. *Modum*,

Modium, this Nonsuit shall not be Recorded, but a Venire facias de novo shall be awarded. So for any other mistake, as if the Record in Court be Grays Inn Lane, &c. and the Nisi prius, which is but a transcript, be Graves Inn Lane, &c. For this is a nonsuit upon another Record, than what is in Court.

In Battery against Three who plead Three severall Pleas, and upon the Writ of Nisi prius, two issues are found for the Plaintiff, and Damages assessed; but nothing is found for the third issue, this is a mistrial, and a Venire facias de novo shall issue.

In Detinue, if the Jury find Damages *Detinue.* and Costs, but no value, as they ought, this shall not be supplied by a Writ of Inquiry of Damages, but a Venire facias de novo shall be granted. And so of other defects in finding the full issue.

In a Quare impedit if the issue be found for the Plaintiff, but by negligence, the Jury do not inquire of the four points, scil. de plenitudine, ex cujus presentatione si tempus semestre transierit, and the value of the Church per annum; This shall be supplied by a Writ of Inquiry, without any Venire facias de novo, because the Court ex officio ought to have charged the Jury with the *Quare impedit.*
four

four points of Inquiry, and if the Jury had found them, no Attaint lay; for as to this, they were but as an Inquest of Office.

Annulry.

In a Writ of Annulry, if the issue be found for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a Writ of Inquiry, but a Venire facias de novo shall be granted.

Ejectment.

In Ejectment against Baron and Feme, and the Jury find the Wife not guilty, and find a special Verdict as to the Husband, which special verdict is afterwards adjudged insufficient by the Court, a Venire facias de novo shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, because the Record and issue is intire, and the Verdict is insufficient and void in tout.

Imperfect Verdict.

So if there be several issues, and the Jury find some well and directly, and in others special Verdicts which are imperfect, a Venire facias de novo shall be granted for all, and the Jury may find contrary to their first finding.

In trespass of Assault and Battery, and taking away of grain, and the Defendant as to the Battery justifies in defence
of

of his grain, upon which the Plaintiff demurs, and as to the grain he pleads not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in demurrer as they ought, in this case, if the demurrer be afterwards adjudged for the Plaintiff, yet the Damages for this cannot be afterwards supplied and taxed by a Writ of Inquiry of Damages, but a Venire facias de novo shall issue to Tryal, because all is comprised in one Original. Vide apres cap. 13. and devant cap. 2.

Who shall grant it?

In a Scire facias upon a Recognisance in Chancery, if the Parties be at issue, upon which the Record is commanded into B. R. and there it appears that the Venire facias is not well awarded, the Venire facias de novo shall be awarded in the Kings Bench, and not in the Chancery. Roll. iii. Tryal 723.

In Yelvertons Reports, fo. 64. the Case is, That a Venire facias was made Vicecomiti, leaving out Salop, for which there was a blank left in the Writ. But revera, it was returned by the Sheriff of Salop. In Arrest of Judgement it was alledged, that the Venire facias was Vicious for this cause; But Gawdy said, it should be amended.

Album breve,
the County
left out in a
Venire facias.

ded; and by Fenner and Williams; It is as no Writ, because it is not directed to any Officer. And then it is aided by the Statute of Jeofailes, For it might rather be called a blank, than a Writ, because it was directed to no Officer. If there be no return of the Sheriff indorsed upon the Venire facias, it was held not amendable. 35 Eliz. lib. 5. 4 Otherwise of the Distringas, if that be Album breve, and no return, if the Venire facias be Right. Rolls tit. 204.

Several Venire facias.

In Cases where there are several Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or several, for every one of the Defendants; But (if you will be ruled by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others Challenge: neither shall the death of one abate the Venire facias against the other; (This he speaks of in Appeals) But if the Court once award a joynt Venire facias, you cannot have several Venires afterwards, though there be nothing done upon the first; except it be upon matter de puisne Temps, as the death of one of the Defendants, &c. lib. 8. 66. lib. 11. 5, 6. Stamford. 155. Bro. tit. Venire facias 2. 35.

But now it is the usual course to have but one Venire facias upon several issues, though

though against several Defendants, Cro. One *Venire facias* in several issues. 3. part. 866. Hob. 36. 64. And so usual, Vide Rolls tit. Trial 596. 620. 667. That there never shall be several *Venire facias* to try several Issues in one County; Hob. 88. 51. For what need the Plaintiff trouble himself, and the Country, with several, when one Jury will serve his turn; Et frustra fit per plura quod fieri potest per pauciora. But otherwise, if it be in two Counties. Cro. 3. part. 866.

After issue joyned by two Defendants, *Venire facias* between the Plaintiff and 2 Defendants where one is dead. if one of them die, and then a *Venire facias* is awarded betwixt the Plaintiff, and both the Defendants, and so in the Hab. Corpora and Distringas, yet this shall not Attaint the *Venire facias*, &c. to make Error; because though one of the Defendants be dead, yet the other being alive, it is sufficient. And there needs be no surmise in Judicial Writs, that one of the Defendants is dead; It is time enough to shew it to the Court at the day in bank. Cro. 1. part. 4. 26. But if there be two Defendants, and the *Venire facias* be but against one of them, 'tis Error, 7 H. 4. 13. and Bro. tit. Ven. fac. 11. Cro. 1. part. 426. No surmise in Judicial Writs of death in one of the parties.

If the *Venire facias* bears date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of

Venire facias dated before the Action brought.

Jeofailes.

Jeofailes. Cro. 1. part. 38. 90, 91. 203, 204. Miscontinuance or discontinuance, or misconveying of Process, is aided by 32 H. 8. 30. The want of any Writ Original or Judicial, defaults in their form, and insufficient Returns thereupon, are aided by 18. Eliz. 14. Cro. 3. part. 259. But you must have a care the Venire facias be not faulty in any other matters of Substance; for if the parties names be mistaken, or the issue, as if the issue be ne unques Execuor, and the Venire facias be in placito debiti, &c. this is a Mistrial. Cro. 2. part. 528. So it is, if the Venire facias be in placito transgressionis, where the Action is in placito transgressionis, & ejectionis firmæ. This misawarding of Process is not aided by any of the Statutes, and better it were, that there had been no Venire facias at all in such a Case; for then the Statutes would have holpen it. Cro. 3. part. 622.

Parties names
mistaken in a
Venire facias.

Mis-tryal.

No Venire fa-
cias holpen.

Return of
Process.

If a Venire facias be directed to the Coroners, all the Coroners ought to joyn in the return, they being Ministers, not Judges, and so both of the Sheriffs of London ought to joyn, or else the Return is not good. Hob. 97.

Note, the Principal Statutes of Jeofailes are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30, 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16 and 17 Car. 2. 8. Intiuled an Act
to

to prevent Arrests of Judgements and superseding Executions. And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any proceedings upon them, for these are excepted, nor to the amendment of any Exigent, to make any one Outlawed. As you may see at large, lib. 8. 162. Blackamors Case.

And the four last of the said Statutes do neither extend to them nor to Actions, or informations upon Penal Latos. Only in the last of them, viz. 16, 17 Car. 2. there is a limitation in the negation of the Extent, scil. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.

If the Venire facias be directed Vicecomiti London, Salutem, &c. præcipimus tibi, and not vobis, after Verdict this is Amendable. 39 Eliz. B. R. Adjudge, Rolls 200.

And so it is, if after & habeas ibi hoc breve, & Nomina Juratorum be left out. ib. and 204.

But if the date of the Teste be after the return, this was held not amendable, 32, 33 Eliz. B. R. ib. sed vide hic ante. But if the Award of the Ven. fac. upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the imprisonment of the Clerk. ib. 201.

Tryals per pais.

If the words, quorum quilibet habeat be left out, or duodecim, or qui nulla affinitate attingunt, or Vicecomiti be left out, these are amendable, as mistakes of the Clerk. Rolls 204, 205.

Venire facias between a party and a stranger.

In some Cases a *Venire facias* shall be awarded to make an Enquest betwixt a stranger to the Writ and issue, and the party. I will instance but in one, and that is upon the Statute of Westm. 2. cap. 6. If a Tenant being impleaded vouch to warranty, and the Vouchee denieth the Deed, or other cause of the Warranty, &c. That the Demandant may not hereby be delayed, he may sue out a *Venire facias* to try the issue between the Tenant and Vouchee.

Inquest at whose request.

Venire facias by Proviso.

Inquests in Pleas of Land, shall be as well taken at the request of the Tenant, as of the Demandant. 2 Edw. 3. cap. 16. If the Plaintiff, or Demandant, desisteth in prosecuting his Action, and bringeth it not to Tryal, then the Defendant, or Tenant may sue forth a *Venire facias* with a Proviso, which is to no other end but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ, to the same purpose; And although, (as my Lord Dyer saith, fol. 215.) the granting of this *Venire facias*, &c. with a Proviso, depends much upon

upon the discretion of the Court, yet for the greater part, it is not grantable for the Defendant, unless when he is actor as well as the Plaintiff, or unless there be a default, and Laches in the Plaintiff; therefore there can be no Tryal by Proviso against the King (unless with the Attorney General's consent,) because no default, or Laches can be imputed to the King. But an abowant in Replevin, may have a Venire facias with a Proviso, immediately after issue joyned, because he is Actor, and in nature of the Plaintiff.

Proof presently after issue joyned.

If the Plaintiff in Detinue, and the Garnishee be at issue, and the Plaintiff prays a Nisi prius, and this is granted, yet the Garnishee at the same time may have a Nisi prius with Proviso because he is Plaintiff also. 19. li. 6. 46. Rolls tit. Tryal 629. Garnished.

If the Plaintiff deliver the Writ to the Sheriff tarde, so late that he cannot serve it, the Defendant shall have a Writ with a Proviso. Tarde.

But at the same time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election. 8 H. 6. 6.

The Proviso ought to be, quando duo brevia

brevia sunt in eodem gradu & qualitate.

If the default be in Plaintiff after issue in the prosecuting of the Venire facias, then the Defendant may have a Venire facias with Proviso, but not a Hab. Corpus with a Proviso until the Plaintiff have made a default in the same Writ, for he ought only to have the same Process with a Proviso, in which there was a default of the Plaintiff first: and therefore although the Defendant had a Venire facias with a Proviso upon a default of the Plaintiff, yet he cannot have a Nisi prius by Proviso without another default of the Plaintiff.

If the Defendant had a Hab. Corpus by Proviso and the Jury remain for want of Hundredors, yet he cannot have a Distringas Jur. with a 10. Tales cum Proviso, until a default of this request of a Tales, is in the Plaintiff. D. 15 El. 318. 10.

How the
Plaintiff may
stop the De-
fendants Pro-
viso.

But note the Nota (in Stamford's Pleas, del Coron. fol. 155.) That if by negligence of the Plaintiff, the Defendant sues a Venire facias with a Proviso, yet the Plaintiff may at his pleasure stay the Defendant, that he shall not proceed in his Process, in praying a Tales upon the Defendants Process, as it appears T. 15 H. 7. fol. 9. And the Defendant shall never be received to pursue this Process with a Proviso,

vise, so long as the Plaintiff pursues, or
is ready to pursue, as appears Mich. 14
H. 7. fol. 7.

And seeing the Tales men offer them- *Tales men.*
selves to us, we will tell them upon what
account they come, befoze they thrust them-
selves into the Inquest, commonly for the love
of eight pence; but it may be, to do some of
their Neighbours a shrewd turn.

¶

C A P.

C A P. V.

Why the *Venire facias* runs to have the Jury appear at *Westminster*, though the Tryal be in the Country. Of the Writ of *Nisi prius*, when first given, when grantable, when not, and in what Writs. Of Justices of *Nisi prius*. Of the *Tales* at Common Law, and by Statute. When the Transcript of the Record of the *Nisi prius* differs from the Roll, whereby the Plaintiff is Non-suit-ed, he may have a *Distringas de novo*.

But to observe the Method of the Writ, the next words are, *Coram Justiciariis nostris de Banco apud Westminster, tali die*. And here first of all, you may ask me, to what purpose the Sherifff is commanded to cause the Jury to come to Westminster, when they are to try the Cause in the

the Country, and in truch are not to come to Westminster? I must confess the resolution of this question is not unnecessary: wherefore we must know, that Originally, before the Writ of Nisi prius was given, the purpose for which the 12. men were to be summoned upon the Writ of Venire fac. to come to Westminster, was that contained in the Writ, videl. Ad faciend. quendam Juratam; for then was the Tryal intended to be there, if a full Jury appeared; if not, then a Hab. Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register) and if they did not appear at the Return in the Hab. Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings Bench, and Exchequer, is, after the Venire fac. to have a Distringas, leaving out the Hab. Corpora. Tryals then were all at the Bar. (I speak not of Asses.) But now, because Jurors did not use to appear upon the Venire facias, it being without penalty; Tryals at the Bar, are appointed upon the Hab. Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas, through fear of forfeiting issues: which the Sheriff returns on the Distringas, not on the Venire facias. By the Statute of 18 Eliz. cap. 5. no Jury shall be compelled to appear at Westminster, for the Tryal of an offence (upon any penal Law)

Why the
Venire facias
is to have the
Jury appear
at Westminster.

Hab. Corp.

Distringas.

Tryals at Bar.

Where a Jury
is not compel-
lable to ap-
pear at West-
minster.

committed above 30. miles from Westmin-
ster, except the Attorney General can
show reasonable cause for a Tryal at
Bar.

Nisi prius,
when first
given, and
wherefore.

Stamfords
Pleas of the
Crown. 156.

Nisi prius in
the *Venire*
facias.

Thus it was at Common Law, before
the giving of the Writ of *Nisi prius*, when
all Jurors, together with the parties came
up to the Kings higher Courts of Justice,
where the Cause depended; which (when
Suits multiplied) was to the intolerable
burthen of the Country 27 E. 1. cap. 4.
Wherefore by the Statute of Westminster, 2
cap. 30. A Writ of *Nisi prius* was first
given; and that, in the *Venire facias*, as
we may see in the form of the Writ there
mentioned, scil. *Præcipimus tibi quod ve-
nire facias coram Justiciariis nostris apud
Westmon. in octabus Sancti Michaelis, nisi
talis & talis tali die & loco ad partes illas
venerint* 12. &c. By which Writ it ap-
pears, that the *Venire facias* was not re-
turnable, till after the day of the *Nisi prius*.
But the mischief thereof was so great, partly
in respect that the parties not knowing the
Jurors names, could not tell how to make
their Challenges, and so were surprized;
and partly, in respect of the Jury, who were
greatly delayed by the Essays of the parties,
that by the Statute of 42 E. 3. cap. 11. It
is Ordained, that no Inquest, but Assises and
deliverances of Gaols, be taken by Writ of
Nisi prius, nor in other manner, at the Suit
of

of the great or small, before that the names of all them that shall pass in the Inquests, be returned in the Court. And their names must be returned upon a Panel annexed to the Venire facias, so that either party may have a Copy of the Jury, that he may know whom to challenge; And the Jury not coming upon the Venire facias, make a feigned default, which warrants the Distringas, &c. unless they appear at the day of the Nisi prius.

The names of the Jurors must be returned into the Court before any Tryal, and why,

So that by what hath been said, you may perceive to what purpose the Sheriff is commanded to cause the 12. men to come to Westminster, though the Tryal be in the Country. And that, ad faciend. quendam Juratam, because it is in the discretion of the Court, whether to grant a Writ of Nisi prius, or to have a Tryal at the Bar. And for this, the Duke of Exeter being Plaintiff in Trespass, a Nisi prius was prayed for the Duke, and it was denyed, for that the Duke was of great power in that County. And if the Tryal should be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. Nay in some Cases, (as if the Cause require long examination, &c.) it is not in the power of the Court to grant a Nisi prius, if the King please: For in such Cases, (as it appears by the Writ in the Register, 186.) the King by his Writ may restrain,

and

It is in the Courts discretion, whether to grant a Nisi prius, or not.

When the Court cannot grant a Nisi prius.

Where the
King is con-
cerned.

and command the Justices, that they shall not award any Writ of Nisi prius, and if they have, that they supersede it. F. N. B. 240. 241. No Nisi prius shall be granted where the King is party, without especial Warrant from the King, or the Attorneys Generals consent. Stamf. 156. F. N. B. 241. 4 Inst. 161.

In a præcipe quod reddat, if the Tenant after aid of the King, pleads to the Inquest; the Plaintiff shall not have a Nisi prius, because the Tenant hath aid of the King, and so the King is in a manner Party. 25 E. 3. 39. Neither is a Nisi prius to be granted, if any of the parties may have prejudice by it.

Certification
of Verdicts.

If the Justices de Nisi prius die before the day in Bank, yet the Record shall be received from the Clerk of Assise, without a Certiorari, or other form of entry but the antient form.

Also in that Case a Certiorari may be directed to the Executors or Administrators of the Justices, to certify the Record. D. 4, 5 Mar. 163. 55. Rolls tit. Tryal 629.

What things
the Justices of
Nisi prius may
do.

They have no power to increase Damages, nor to allow or disallow protections, nor to allow a Plea of Excommungement in the Plaintiff. But they may record the

the protection and the default, and this shall be allowed or disallowed in B.

They may demand the Jurozs upon a Pein, they may amerce Jurozs, and punish a Trespass done in their presence, which is in despite of the King, and for this make Process, and may fine Offenders.

Jurors sur
paine fine.

In Ejectment the Defendant may plead at the Assises, that the Plaintiff hath entred into parcel of the Land mentioned in the Declaration puis le darrein continuance, and the Justices of Nisi prius may accept this Plea. But it is in their Election; for if they perceive the Plea is dilatory, they may refuse it, for it is in their discretion. Sir Hugh Browns Case in Scaccario. Mich. 8 Jac. Rolls in. Tryal 630.

Plea puis
darrein con-
tinuance.

If 11 Jurozs be sworn, and the 12th. is challenged, and the Jurozs cannot agree in the challenge; for 10 affirm the challenge, and the other denies it: although the party which did not take the challenge, will not agree that the Eleven sworn shall have another to them in the lieu of him that is challenged, yet the Court may do this.

The power of
the Judge up-
on disagree-
ment or other
matter.

Challenge.

If a challenge be taken to the Array before any Juroz is sworn, and Triors be chosen, who cannot agree, yet they shall not be commanded in Custody, because they never were sworn upon the principal.

But

But the Court may discharge them and chuse others.

Jurors discharge.

If there be three Jurors who will not agree, the Court cannot take the Verdict of two, and command the other to prison. The same Law in case of a Verdict upon an Issue.

Where 14 Jurors are impannelled for the King, the Judge cannot discharge any of them after they are sworn, if not that they will not agree with their Companions.

Amencement.

If the Jury say upon demand of the Court, that they are agreed, and afterwards when they are opposed, they say the contrary in any matter, they may be amerced for this. Rolls iii. Trial 675.

Nisi prius why so called.

And now since the *Nisi prius* (for so it is called, because the word *prius* is before *venire*, in the *Distringas*, &c. which was not so in the *Venire facias*, upon the Statute of W. 2. cap. 30. before rehearsed,) must not be in the *Venire facias*, because the names of the Jurors are to be returned to the Court, before the granting of the *Nisi prius*; therefore the *Nisi prius* is now in the *Hab. Corp.* and *Distringas*. And if the Sheriff return not a Panel of the Jurors,

No *Nisi prius* before the *Venire facias* is returned.

rogs, upon the Venire facias, there shall be no Nisi prius upon the Tales, untill a Pannel be returned. 27 H. 6. fol. 10. 1 H. 5. fol. 11. which brings me again to speak of the Tales.

A Tales is a supply of such men, as were impannelled upon the Return of the Venire facias, grantable, when enough of the principal Pannel to make a Jury do not appear, or if a full Jury do appear, yet if so many are challenged, that the residue will not make a Jury, then a Tales may be granted. And this at Common Law was by writs of Decem tales, Octo tales, &c. (out of the Kings Courts) one of them after another, as there was need, untill there was a full Jury. But now by the Statutes of 35 H. 8. 6. 4, 5. P. M. 7. 5 Eliz. 25. and 14 Eliz. 9.

The Tales at
Common
Law.

The Justices of Assise, and Nisi prius, at the Request of Plaintiff, or Demandant, Defendant or Tenant, or of the prosecutor tam quam, (if two, more, or but one of the principal Pannel appear at the day of Nisi prius,) may presently cause a supply to be made of so many men as are wanting, of them that are there present standing about the Court; and hereupon the very Act is called a Tales de circumstantibus.

Tales by
Statute.

Note the difference between Tales at Common Law, and Tales by the Statute.

the

the

the first called only [Tales], the second, [Tales de circumstanibus], the last of which can't be granted at a Tryal at War, which is a Tryal at Common Law; for there it must be only [Tales] by Writ annexed to the Venire facias. But Tales de circumstanibus is given by Statute to Tryals by Affise and Nisi prius, per Stat. 35 H. 8. 6. Yet such a Tales to an indictment in Wales, was out of that Statute, and helped by 4, 5 Ph. Mar. 7.

Tales in what Cases it shall be granted.

If the Issue be to be tryed per two Counties, and one full Inquest appear of one County, but the Inquest remain for default of Jurors of the other County, A Tales shall be awarded to the County where the default is, not to the other.

If a Juror die after he is Impannelled, a Tales shall issue, not a Venire facias.

What persons may have a Tales.

Upon a Pluries Distringas, three only appear, the Plaintiff prays another Distringas, without praying a Tales, yet if the Defendant pray a Tales, the Court ought to grant it. D.20 El.359.2.

In what Cases.

A Tales shall be granted in an Attaint, if all the Grand Jury make default.

At what time.

It cannot be granted at the day of the return of the Venire facias,

If

If the Venire facias be good, and the Hab. Corpus, ill, if the Pannel be affirmed, yet the Tales is void, for in effect there is only a Venire facias returned, and then no Tales.

If the Defendant hath a Hab. Corpus with a Proviso, yet the Tales ought not to be granted with a Proviso at the Defendants request. before a default in the request of a Tales in the Plaintiff. Tales with a Proviso.

At Common Law before the Statute by Custom of a Court a Tales de circumstantibus might be granted, for this is a good Custom. Dubitatur, Rolls tit. Tryal 672.

If great persons are concerned, and by their labouring the Jury doth not appear, and Tales men are prepared for their turn, and there is a great tumult de circumstantibus; The Justices of their discretion may deny a Tales, and adjourn in Bank, notwithstanding the Statute. The principal Pannel must stand, or else there can be no Tales. Tales denied.

If the Bayliff of the Franchise answer, that there be not sufficient of his Bayliwick, the Justices may award a Tales de circumstantibus to be returned by the Sheriff.

If the Tenant for life pray in aid of
A 2
the

Tryals per pais.

the King who hath the reversion, the Justices cannot grant a Tales de circumstantibus, because the King is concerned.

If two Coroners or Esliers return the Panel, one of them cannot return the Tales, &c.

If the Defendant sue the Writ of Nisi prius by Proviso, yet the Plaintiff may have a tales, &c.

Attorney.

The Sheriff may return 24. 40. or any number upon the Tales de circumstantibus. And it may be prayed by Attorney, (although the Statute doth not mention an Attorney) as well as in proper person. The Vouchee in a præcipe quod reddat may pray a Tales, though he be neither Plaintiff nor Demandant, in the first action.

If there be three Plaintiffs in Replevin, &c. and one of them makes default at the Nisi prius, the other two cannot pray a Tales: otherwise of two Coparceners.

Mayor and Commonalty, in their proper persons cannot pray a Tales. A Bishop or Abbot may.

Two Plaintiffs in Trespas and at the Nisi prius the Defendant shew a Record to the Court, by which it appears that one of the Plaintiffs was Outlawed after the last continuance,

continuance, the other cannot pray a Tales.

The Sheriffs upon the Tales de circumstantibus may Impannel a Priest or Deacon, if he hath sufficient freehold of Lay Fee, but not an Infant, nor one of the age of 80 years.

He may Impannel Coroners, Capital What persons
ministers of any Corporation, Foresters, of the Tales,
men blind, mute, (if they have their understanding, but not Deaf men) Excommunicated persons, but not Outlawed or attaint, not Aliens, nor Clerks attainted, nor persons attainted of false Obedience.

The Coroners may put the Sheriff on the Tales.

It seems by the Statute, none of the Challenge.
parties can challenge the Array of the Tales, but only to the Poll.

After a challenge to the Poll tryed, there shall be no other challenge to the same Poll, for any cause or matter that is at the same time.

In an action of Trespass, for taking away the Plaintiffs money, one of the Tales was challenged, because he was a common Fosterer of Thieves, and dwelt in a suspicious place, and of ill fame, and held a good challenge.

For Challenges see the Tir. Challenge at large. What

What issues shall be tryed by Tales de circumstantibus, see Williams his reading, & hic cap. 7.

But since none can come after the Reporter, obserbe with me his Nota Lector, in his 10th. Report 104. That at Common Law, in the granting of a Tales, five things are to be considered.

1. The time of the granting, &c. thereof.

2. The number of the Tales.

3. The order of them.

4. The manner of Tryal, that is, where by them with others, and where by them only.

5. The quality of them is to be considered.

As to the first, 4 things are likewise to be considered.

1. That the time of granting them is upon default of so many of the principal Panel, that there cannot be a full Inquest.

2. That at the time of granting them, the principal Array stand; for Tales are words similitudinary, and have reference to the aRem.

asssemblance, which then ought to be in esse; and therefore if the Array be quashed, or all the Polls challenged and tried, no Tales shall be awarded, for then there are not Quales, but in such a Case, a new Venire facias shall be awarded. But if at the time of granting the Tales, the principal Pannel stand, and afterwards is quashed as aforesaid, yet the Tales shall stand: For it sufficeth if there were Quales, at the time of granting the Tales.

3. It is to be observed, that he, which is merely Defendant, cannot pray a Tales till the Plaintiff hath made default.

4. In some Cases, a Tales shall be granted after a full Jury appear and is sworn; as if a Jury be charged, and afterwards before a Verdict given in Court, one of them die, a Tales shall be awarded, and no new Venire facias: and so if any of the Jurors Impanelled die before they appear; and this appears by the Sheriffs return, the Pannel shall not abate, but if there be need, a Tales shall be awarded. And the time for Challenge, and Tryal of the Tales, is after the principal Pannel be tried; and if the principal Pannel be affirmed, the same Tryers shall try the Tales; But if it be quashed, then the two Tryers of the Principal shall not try the Tales.

As

As to the second, to wit, the number; two things are to be observed.

1. That in all Cases, the Tales ought to be under the number of the principal in the *Ventre facias*, (unless in Appeals) as in *Attaine* under 24. and in other Actions where the *Ventre facias* is of 12. under 12. And the reason wherefore more than the number may be granted in Appeals of the Plaintiffs part, is, because the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tale, and the Reason is in favorem vice, and that he may expedite and free himself from vexation and the question of his life, for fear that his witnesses should die.

2. That the number ought always to be certain, as 10. 8. 6. or 4. &c. But now by the Statute of 35 H. 8. a Tale de circumstantibus may be granted, as well of an uncertain as a certain number, and that by force of these words in the Stat. 35 H. 8. So many, &c. as shall make up a full Jury.

As to the third, to wit, the Order, It is to be known, that always in every new Tale, the number shall be diminished, as if the first be 10. the second shall be 8. and so always less. But if the Tale awarded be quashed

quashed by Challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others; but by them only, when after the granting the Tales, the principal Pannel is quashed, then the Tryal shall be only by the Tales; or if the Tales do not amount to a full Inquest, another Tales to supply the former, may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same Quality as the Quales are; and therefore if the first be per medietatem lingue, of English and Aliens, so ought the Tales to be, so if the Principal be out of a Franchise; so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required by the Law, in the Quales, are required in the Tales: As you may read in the aforesaid Statutes. vide Scamf. Plees del Corone, fol. 155.

Therefore if the *Venire facias* be not de medietate lingue, the Tales cannot.
3 E. 4. 12.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where Attaint.
such

such Attaint is taken ; a Tales may be awarded into the Shire next adjoyning.

Nisi prius.
amendable.

Justices of
Nisi prius, and
Justices of
Assise,

If the Transcript of the Record of the Nisi prius be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes Non-suit, he may have a Disstringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1. part. 204. Palmers Reports. 378. For there is but a Transcript of the Record sent to the Justices of Nisi prius. First they were Justices of Assise, and therefore they retain that name still though Assises are very rarely brought : For this common Action of Ejectment hath Created most real Actions ; and so the Assise is almost out of use.

CAP.

C A P. VI.

Of the number of the *Jurors*, and why the Sheriff returns 24. though the *Venire facias* mentions but 12. If he returns more or less, no Error, and of the number 12. And when the Tryal shall be *per primer Jurors*. And of Inquests of Office; and when to remain *pro defectu Juratorum*.

NOW for the Quales: and these you see for number, must be 12. by the Common Law, D. and St. fol. 14. for quality, *liberos & legales homines*. And first of their number 12. And this number is no less esteemed of by our Law than by Holy Writ. If the 12 Apostles on their 12 Thrones, must try us in our eternal State, good Reason hath the Law to appoint the number of 12. to try our temporal. The Tribes of Israel were 12. the Patriarchs were 12. and Solomon's Officers were 12. 1 Kings 4. 7. vide Sir Hen. Spelman, verb. [*Jurata*] Therefore not only matters of fact were tryed by 12. but of ancient time 12. Judges were

Of the number 12.

Josh. 4.
Genes. 49.

Flow. Com.
in procmlo.
12 Judges.

Less than 12
in Inquests of
Office.

Finch 400.
484.

Inquest of Of-
fice. Vide h.c.
cap. 13.

to try matters in Law, in the Exchequer Chamber, and there were 12. Counsellors of State, for matters of State; And he that wageth his Law, must have 11. others with him, which think he says true. And the Law is so precise in this number of 12. that if the Tryal be by more or less, it is a Mis-tryal; But in Inquests of Office, as a Writ of Waste, there less than 12. may serbe. F. N. B. 107. c. and in Writs to inquire of Damages, the just number of 12. is not requisite, for they may be ober or under; And so it was resolved Trin. 1651. B. R. Abbot vers. Holt, that the Sheriff ought (in Writs of Inquiry) to summon 12. by their names, yet Damages assessed by a less number is sufficient, and in the Writ to the Sheriff, quod ipse inquiret per Sacramentum pro bonorum hominum, omitting [duodecem] its good and usual.

And in a Writ of Inquiry of Waste by 13. it was holden Good. 1. Cro. 414.

In Dower if the Tenant come at the Grand Cape, and say he was always ready to render Dower, and issue is taken upon this, although seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Tryal of the issue, shall assess Damages. 22 E. 3. 15.

In what cases there shall be an Inquest of Office, and in what not, see Rolls iii. Tryal 595.

And although there can be no Verdict but by 12. yet by ancient course and usage, (which as my Lord Cook tells you, makes the Law in this Case, 1 Inst. 155.) the Sheriff is to return 24. And this is for expedition of Justice; for if 12. should only be returned, no man should have a full Jury appear or sworn, in respect of Challenges, without a Tales, which should be a great delay of Tryals; And for this cause at Common Law, 'twas Error if the Sheriff returned less than 24. But now it is remedied by the Statute of 18 Eliz. as a mis-return, see Cro. 1 part. 223. li. 5. 36, 37. By which Books it appears, that if the Sheriff return but 23. &c. it shall not vitiate the Verdict of 12. So, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3. part. 587. The Sheriffs used to summon above 24. scil. effrenatam multitudinem, but now they are prohibited by Statute, to summon above 24. Westm. 2. cap. 38.

Why the Sheriff returns 24.

If the Sheriff return less than 24 it is no Error.

Must not return above 24.

If the issue be to be tryed by 2 Counties, if but one of one County appear, although

In what cases the Inquest shall remain for default of Jurors.

2 Counties.

a full Inquest appear of the other, yet this shall remain for default, because they cannot try that which is in another County. There ought to be six of each County. And so of one Inquest out of a Franchise, and another out of the Guildable, and so of 2 Pannels returned in an Assise by several Bayliffs of Franchises to try one issue, and one Pannel makes default, the issue shall not be tryed by the other Pannel, for the Jurors in one Franchise cannot make the view in another Franchise. Roll. tit. Tryal 673.

The manner
of swearing
the Jurors.

If the Jury be of 2 Counties, or 2 Pannels of the Guildable and Franchise, &c. they shall be sworn interchangeably first one of one, then another of the other.

If the Jury go at large until another day after they are sworn, and the Roll of the entry be not in Court, they may be sworn anew. Roll. tit. Trial 674.

Where there
must be 16.
and 24. in a
Jury.

To make a Jury in a Writ of Right, which is called the Grand Assise, there must be 16. scil. four Knights, and 12. others; the Jury in an Attaint, called the Grand Jury, must be 24. Finch 412. & 485. But if the issue be upon a matter out of the point of the Attaint, as upon a Plea of non-rezure, the Tryal shall be by 12 Juratores. 21 E. 3. 10.

There

There may be more than 16 in a Wit-
of right. Rolls tit. Tryal 674.

When Proceſs uſed to be made out
againſt the Witneſſes in Carta nominat. to
joyn with the Jury in Tryal of the Deed,
as was uſed beſore the Statute of 12 E.
3. C. 2. ([his Teſtibus] being then part of the
Deed) then the number was uncertain,
according as the number of Witneſſes were
in the Deed : wherefore no Attaint lay, if
the Deed were affirmed, becauſe more than
12 joyned in the Verdict. But otherwiſe,
if the Deed was not found, becauſe Wit-
neſſes cannot prove a Negative. F. N. Br.
106. h. 1 Inſt. 6. 2 Inſt. 130. &c.

Where Wit-
neſſes joyn
with the
Jury, the
number is un-
certain.

Cannot prove
a Negative.

If 12 are ſworn, and one of them de-
part by conſent, another of the Pannel may
be ſworn, and joyn with the other 11. in
the Verdict. 11 H. 6. 13.

Juror departs
and another
ſworn by
conſent.

In Error upon a Judgment in Cornwall, A Jury of 6.
becauſe the Tryal was but by 6. adjudged
that it was erroneous, though it was re-
turned ſecundum conſuetudinem ibidem
ante, &c. for ſuch Customs are againſt
Law, unleſs in Wales, which are per-
mitted by Act of Parliament. Cro. 1. part.
259.

Per primer
Jurors. See
hic cap. 4.

If the record be pleaded in Bar of the Assise, and the Party that pleads says, the same Tenements were put in view to the former Jurors: If the Plaintiff saith nient comprise, This shall be tryed per primer Jurors, & auters. 13 H. 4. 10.

So if the Tenant saith that these Lands are not the same Lands before recovered, this shall be tryed per primer Jurors & auters. 22. Assise 16. and so in a Redifseisin.

So in an Assise, if the Defendant plead a Recovery per view de Jurors in another Assise, this shall not be tryed by the Assise but per primer Jurors. 13 H. 4. 10.

And if at the return of the former Jurors and others, all the former Jurors appear, the Tryal shall be by them only, but if any do not appear, they shall be supplied by the others. 40. Assise 4.

In such cases where the Plaintiff is not to recover the Land, nor to defeat the former Judgement, if nient comprise be pleaded upon a Recovery pleaded, this may be tryed by other than the former Jurors. 1 H. 6. 5.

As in Trespass for Trees cut, the Defendant pleads that he recovered before in an

an Assise the same Land where, &c. and
 cut, &c. the Plaintiff says this Land,
 where, &c. was not put in view, and
 so nient comprise. This shall not be
 tryed by the first Jurors, but by others, be-
 cause this action doth not defeat the former
 Judgement nor recover any thing but Da-
 mages. Note the difference. 1 H. 6. 5.
 Where the Tryal shall be per primer Jurors,
 and where by them and auters, and where
 only per auters, see Rolls tit. Tryal. 593.

Certificate of
 Assise what.

This is where the Bayliff of a Tenant in
 an Assise pleaderh, &c. and loseth by the Assise.
 and the Tenant himself hath a release, or
 some other discharge to plead, then he may
 by this means have the parties and first
 Jurors to appear again, and if it be found,
 he that before recovered shall lose the Land,
 and yield double Damages. Terms of Law.

R

G A P.

C A P. VII.

Who may be *Jurors*, who not; who exempted; and of their Quality, and Sufficiency.

*Jurors must
be Libers.*

Fortescue
cap. 25.

So much for their Number, next their Quality is to be considered; And for this, the Writ informs you who they ought to be, 1. Liberos, that is, Freemen, not Villains, or Aliens, and that not only Freemen, and not bond; but also those that have such freedom of mind, that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever, to either party; sometimes the Word Probos, instead of Liberos, is attributed to them; they are both good Epithetes for a Juror, but I esteem the first most significant.

Legales.

2. They ought to be Legales, not outlawed, not such as have lost *Liberam legem*, or become infamous, as Recreants, persons attainted of Felony, false Verdict, Conspiracy, Perjury, *Præmunire*, or Forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute

Statute of 1 H. 5. 3. Not such as have had Judgement to lose their Ears, stand on the Pillory or Tumbrel, or have been Stigmatized or branded, nor Infidels, neither can any such be Witnesses. 1 Inst. 6.

3. Homines; they ought to be men, (yet there shall be a Jury of Women to try if a Women be Enseint, upon the Writ de ventre inspiciendo.) But what kind of men these ought to be, is worthy to be known. And for this, some men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in degree. Many are exempted by the Writ de non ponendis in Assisis, F. N. B. 166. as aged persons 70. years old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forest, (out of the Forest) Coroners, Infants under the age of 14. years, Officers of the Sheriff, sick decrepit men, and such as are exempted by the Kings Charter: yet in a Grand Assise, preambulation, Attaint, and in some other special Cases, such men as are not exempted by reason of their Dignity, shall be forced to serve, notwithstanding their exemption in other Cases. See Daltons Office of Sheriffs, fol. 121. 52 H. 3. cap. 14. 2 Inst. 127. 130. 378. 447. and 561. Counsellors, Attorneys, Clerks, and other Ministers of the King Courts, are not to serve on Juries; But I find one Jury

A Jury of Women.

Exemption of Juries.

Who are to be exempted from Juries.

A Jury of
Attorneys.

made of Attorneys of the Common Bench, and Exchequer, in a Case brought upon a Bill in the Exchequer, by Sir Thomas Seton, Justice, against Luce C. for calling of him Traytor in the presence of the Treasurer and Barons of the Exchequer. And this Jury of Attorneys gave the Justice one hundred marks Damages. 30 Assise 19.

The Court frequently order a Jury of Merchants, to try Merchants Affairs.

In what cases
they shall be
discharged by
Charter.

If the Charter of exemption be, that he shall not be put in Juratis Assisis seu recognitionibus, aliquibus per this shall not excuse in a Writ of Right upon Tryal of the Grand Assise, for he comes, not in in this Case by such Process as in other Cases, but is chosen by the Oath of the 4 Chivaliers, and now he is in a manner Judge in this Case. 39 E. 3. 15.

Neither shall it exempt him in an Acount, nor in a Grand Inquest, to inquire of Felonies, &c. because the Charter hath not this Clause, Licet tangat nos & heredes nostros, 42. Ass. 5.

At what time
and how the
Charter shall
be allowed.

At the Nisi prius the Bayliffs of a Writ. may shew a Charter, that to try contracts, &c. within the Writ. the Inquest shall be all of Denizens without Foreigners, and this shall be allowed, and the Foreigners shall be ousted. 29. Assise 15. So

So may the Burgesſes, who are put upon a Jury, out of the Borough, if they have ſuch a Charter. 30. Aſſiſe 1.

If a man be Impannelled of an Inqueſt and ſhew ſuch Charter of exemption of the ſame King in whole time he ſhews it, this ought to be allowed without Writ. 39 E. 3. 15. Rolls ib. 633. Allowed without Writ.

4. De vicinet. de C. It is not ſufficient that they dwell in the County, but they are to be of the Neighbourhood, *Ray le plus proche* Vifne: cheins, to the place of the fact, as by Artic. ſuper cap. 9. it is appointed: They muſt be moſt near, moſt ſufficient, and leaſt ſuſpicious, ib. as I ſhall ſhew hereafter.

5. *Quorum quilibet habeat quatuor libras terre, rehenent. vel reddit. per annum ad minas*; This is their ſufficiency, where the debt or Damages (or both together, 1 Inſt. 272.) amount to 40 Marks or above. The ſufficiency of Jurors in other Caſes of leſſer moment, is ſtill left to the diſcretion of the Juſtices, Forteſcue cap. 25. who (experience tells us) never require Jurors under 4 li. per annum, according to the Statute of 27 Eliz. cap. 6. before which, men of 40 s. per annum, ſerved; But neither this, nor the Stat. of 35 H. 8. extends to Juries in Cities, Towns Corporate, or other

Tryals per pais.

other privileged places, or in the 12. Shires of Wales, so that there they shall be returned, as before they lawfully might have been; for the Jurors sufficiency in Attainis, see the Statutes 15 H. 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

As to the Statute 35 H. 8. 6. The tryal ordained by that Statute, lyes only in such actions, which have their ordinary tryal by 12. men, and not more, and by Writ of Nisi prius, and this only in those actions, in which the Process of Vquire facias, Habeas Corpora and Distringas, lyes against the Jurors, and in no other actions.

And although the Statute only mention the Tryal of issues joyned in the Kings Courts commonly holden at Westminster. and if the action be commenced in any other Court: yet if the Issue be joyned in any of the Courts at Westminster, it shall be tryed according to the said Statute, and so if those Courts are removed from Westminster, the issues joyned in them shall be tryed as the said Statute directs.

And the words betwixt party and party, shall only be intended of Common persons, and not betwixt the King and any other person, nor when the King joyns with any other person, in any action which by his release or pardon may be discharged before the action brought. Which

Which is necessary to be known, in respect of Tales de circumstantibus, &c. See Williams his reading upon this Statute lately come out in print. In which are many ingenious speculations, but because they do not come often in practice, and the project of this Treatise, is only to contain matters useful for practicers; that the Book may not swell too big, I omit them, referring you to the reading it self. See afterwards in the Chapter of Challenges.

It is the General course of the World, to esteem men according to their Estate; For Quantum quisque sua nummorum servat in arca, Tantum habet & fidei: And sure I am, the makers of this Law had cause enough to do so in this Case; for if men of less Estates should serve in Juries, such Fellows would only be shifted into Inquests as had more need to be relieved by the 8d. than discretion to sift out the truth of the fact: 'Tis hard to get an unbysse'd Jury now; But surely, less rewards would sooner bytbe and byass meaner men, than these. Therefore less poverty or necessity should tempt, Every Juror must have 4 li. per annum, as aforesaid, of Freehold, out of Ancient Demesne. And the Court may in matters of great consequence, direct a Venire facias, for a Jury of above 4 li. per annum, a piece, but not under. Cro. 2. part.

Jurors of
above 4. li.
per annum.

672. But in such Cases (every one knows) the Court most Commonly orders the Prototary to chuse 48. out of the Sheriffs Book of Free-holders, of the most substantial men in the County, and the parties beske out 12 a piece, then the Sheriff returns the rest.

Jurors of 20.
per annum.

None in former times when Estates of inheritance were in few mens hands, such as had 40. s. per annum were found sufficient men to serve on Juries. After Estates of inheritance coming in greater measure to the Vulgar, it was by the said Statute 27 Eliz. cap. 6. made 4. l. per annum, and the same reason improving in late times, it was thought consulting with the wisdom of a Parliament to raise it to 20. l. per annum, so the and mens Estates might be trusted in the judgement of more knowing Judges of fact, when they become litigious, and this was by an Act of 16, 17 Car. 2. cap. 3. which being but a probationer, and to continue but for 3 years, and from thence to the end of the next Session of Parliament, it is expired, but for that it may be revived, as I humbly judge it expedient, I have thought fit to hint thus much concerning it.

Such a man who hath Land, Rent, Office or other profit Appendre, out of ancient Demesn, to the clear yearly value of 4. l. of which he may have an Assise, he hath
suffi.

sufficient Freehold, to be a Juror. Vide the said reading. Where you may know what Estate is sufficient to make a man a Juror. See hic in the Chapter of Challenges.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefoze lest kindred and Affinity should wrong the Conscience to help a freind, our Jurors must not be related to any of the parties; And for this Reason likewise, the Statutes prohibe, that no man of Law shall ride Judge of Assise, or Gaol-delivery, in his own Country, 8 R. 2. 2. 33 H. 8. cap. 24. yet the contrary hereof is often done by a non obstante; but how consistent with integrity or prudence, they know best who procure it to be done. But because most things concerning the Quality and sufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; And first, observe more particularly, De quo viciner. the Jury ought to come.

Jurors must not be of affinity to the parties:

C A P. VIII.

Concerning the *Visne*, from what place the *Jury* shall come, &c.

Visne.

Vicinetum is derived of this word Vicinus, and signifieth Neighbour-hood, or a place near at hand, or a Neighbour place, where the question about the fact is moved. And the most general Rule (saith Coke, 1 Inst. 125.) is, That every Tryal shall be, out of that Town, Parish, or Hamlet, or place known out of the Town, &c. within the Record, within which the matter of fact issuable is alledged, which is most certain and nearest thereunto, the Inhabitants whereof may have the better and more certain knowledge of the fact.

And if a thing be alledged in D. the Venue must not be of D. but de vicineto de D. for otherwise the Neighbourhood would be excluded. Roll. tit. Tryal 622.

And if the fact be alledged in quadam platea vocat. Kingstreet in parochia sanctæ Margaretæ in Civitate Westm. in Com. Midd.

In

In this Case the Visne cannot come out ^{Parish.} of Platea, because it is neither Town, Parish, Hamlet, nor place out of the Neighbourhood, whereof a Jury may come by Law; but in this Case, it shall not come out of Westminster but out of the Parish of St. Margaret, because that is the most certain. But therein also it is to be noted, that if it had been alledged in Kingstreet, in the Parish of St. Margaret, in the County of Middlesex, then should it have come out of Kingstreet; for then should Kingstreet have been esteemed in Law a Town: For whenever a place is alledged generally in pleading (without some addition to declare the contrary, (as in this Case it is) it shall be ^{Town} taken for a Town.

And albeit parochia generally alledged, is a ^{Parochia.} place incertain, and may (as we see by experience) include divers Towns; yet if a matter be alledged in parochia, it shall be intended in Law, that it containeth no more Towns than one, unless the party do shew the contrary. But when a Parish is alledged within a ^{More 559.} City, there without question the Visne shall come out of the Parish, for that is more certain than the City.

If a matter be pleaded done apud Bradford in Forfeild in parochia de Belbroughton, the Venue shall be of Belbroughton, and not of Bradford, for Belbroughton shall be intend-

ed to be a Town, and one Town shall not be intended to be in another Town, and therefore Bradford shall not be intended to be a Town. Rolls tir. Tryal 619.

The Venue shall ever be of the most certain place.

In a Quo warranto for using a Warren in D. if the Defendant say the Ville D. is parcel of the Mannor of S. and prescribes to have a Warren within the said Mannor and Demesnes thereof, the Venire facias shall be of the Mannor, for the Mannor by intendment, is more large than the Vill. If the Visne be de D. and S. and the Venire facias be de D. S. and V. this is not good, because it is too large. If apud Burgum de Plimouth, the Venue may be de Plimouth generally. If apud Villam de Cambridge in Warda Fori, and the Venire facias is de Villa & Warda prædict. this is helpt by the Statute of Jeofailers.

If the place be out of a Town, the Venue shall not be of the next Town, but from the place it self, but the Sheriff ought to return the Jury de plus prochain vill.

In Ejectment of Land in Foresta de Kevennon in Com. the Venue may be de vicineto Foresta, for this is a place known, and by intendment, because the Defendant hath
not

not pleaded in abatement, This is out of any Parish or Will.

In inferior Courts within Boroughs the Venire facias is Quod Venire facias 12. liberos Burghenses Burghi & parochia de B. although there may be 12 Burghesses which are not inhabitants, Rolls iii. Tryal 622. &c.

The Venue shall follow the issue. vide hic postea.

In Trespas and Battery in London, if the Defendant justifie in Mid. by Process out of the Marshalls Court, that he arrested him, and because the Plaintiff would not go with him, he beat him, &c. Absque hoc that he is guilty in London vel alibi, out of the Jurisdiction of the Court. To which the Plaintiff replies and acknowledges the arrest, but says that he beat him at London de injuria sua propria absque tali causa, and if sue upon this, This shall be tryed in London, and the words absque tali causa are void, the issue being joyned upon a place certain, scil. London, affirmed in a Writ of Error. Rolls ib. 624. But the Court said, that he might have Demurred upon this Plea.

If a Trespas be alledged in D. and nul De Corpore
 tiel ville is pleaded, the Jury shall come de Comitatus.
 Corpore Comitatus. But if it be alledged
 in S. & D. and nul tiel ville de D. is plead-
 ed,

Mannor.

ed, The Jury shall come out de vicineto de S. For that is the more certain. So if a matter be alledged within a Mannor, the Jury shall come de vicineto Manerii. But if the Mannor be alledged within a Town, it shall come out of the Town, because that is most certain, for the Mannor may extend into divers Towns. And all these points were resolved by all the Judges of England, upon Conference between them, in the Case of John Arundel Esq; indicted for the death of William Parker.

De Corpore Com.

Where there may be a special Visne, the Tryal shall never be de Corpore Comitatus, Leon. 1 part. 109.

If a Venire facias ought to be of one or more Vills in certain, in a County, and this is awarded de Corpore Comitatus, This seems to be aided by the Statute of 21 Jac. of Jeofailes, for this comes from the Vills out of which it ought to come, and from others, in as much as it comes de Copore Comitatus. Rolls tit. Tryal 618. and many other cases touching this matter,

But in Ejectment of Land called S. and no place is named where the Land lyes, and a Venire is awarded de Corpore Com. this is erroneous, and too large, because there is a place certain where the Land lyes, and yet it is not named in the Nar. as it ought to be. Hob. 121. But

But if the issue be taken upon a title of dignity, as whether Chivaler or not, this may come de Corpore Comitatus, because that the lieu lou, &c. is not material. ib.

If A. by the name of A. of the County of Hamshire bring a Scire facias upon a Recognisance in Chancery in the Countie of Mid. against B. And the Defendant plead that the Plaintiff is Outlawed by the name of A. of the County of Chester, to which the Plaintiff replies, that he is not una & eadem persona, this may be, by the body of the County of Mid. where the Writ is brought. ibidem.

In a quare impedit for the Church de Uselbee, and the Defendant pleads that there is no such Church, the Venue shall not come de Corpore Comitatus, but de vicineto de Uselbee, for this is a place known, and it is intended the Church of Uselbee is within the Ville of Uselbee, Hob. 325.

In a prohibition, if the parties be at it wild. sue upon a custom de non decimando of wood in the Wild of Suffex, the Venire facias shall be de Corpore Com. for the Wild is not such a place, whereof the Court may have cognisance to be sufficient to have a Jury to come from this, for the Wild is a wood by intentment. Hob. 348.

In

Heir tryed
where the
Land lies,
where not.

In a real Action where the Demandant demands Land in one County, as Heir to his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be tryed where the Birth is alledged, but where the Land lyeth; For there the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman, (for that is the surer, and more certain side, and the Mother is certain, when perhaps the Father is uncertain) and therefore there it shall be tryed where the Birth is alledged, because they have more certain Conscience, than where the Land lyeth.

Cro. 3. part.
818. Cro. 2.
part. 303.

Bastardy.

And so it is where Bastardy is alledged, the Tryal shall be in like Case, Mutatis mutandis.

Non concessit
where the
Land lies.

If the man plead the Kings Letters Patents, and the other party plead non concessit, it shall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Vilne.

Every Tryal must come out of the Neighbourhood of a Castle, Pannor, Town, or Hamlet, or place known out of a Castle, Pannor, Town or Hamlet, as some Forests, and the like, as before,

Every

Every Plea concerning the person, Where the Plaintiff, &c. shall be tryed where the Writ is brought at Common-Law.

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchise, it shall be tryed at the Common Law.

Matters done beyond Sea may be tryed in England, and therefore a Bond made beyond Sea, may be alledged to be made in any place in England, if it bear date in no place; But if there be a place, as at Bordeaux in France, then it shall be alledged to be made in quodam loco vocat. Bordeaux in France, in Mington in the County of Middlesex, and from thence shall come the Jury 1 Inst. 261. Lach. 4. and 5. So if the Tenant plead that the Demandant is an Alien born, under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was born at such a place in England, within the Kings Legiance, and hereupon a Jury of 12. men shall be charged; and if they have sufficient Evidence that he was born in France, or in any other place out of the Realm, then shall they find, that he was born out of the Kings Legiance. And if they have sufficient Evidence that he was born in England,

Matters done beyond Sea, how tryable in England. Vide cap. 10.

Alien.

Things done
beyond Sea.

Lib. 7. 26.

02 Ireland, 02 Guernsey, 02 Jersey, 02 elsewhere within the Kings Obedience, they shall find that he was boꝝn within the Kings Regiance. And this hath ever been the pleading, and manner of Tryal, in that Case. So of other things done beyond Sea, the aduerse party may alledge them to be done at such a place in England, from whence the Jury shall come, and in a Special Verdict, they may find the things done beyond Sea. Ib. lib. 7. 26.

Part without
the Realm,
and part
within.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if issue be taken thereupon, shall be tryed here by 12 men, and they shall come out of the place where the Writ of Action is brought. Ib. lib. 6. 48.

Full age tryed
where the
Land lies.

Error, for that Judgment was given by default against the Defendant, being an Infant, issue was taken that he was of full age. And Godfrey moved, whether the Tryal should be in Norfolk, where the Land was, or in Middlesex, where the Action was brought. And the Court held, that it should be tryed in the County where the Land lay; and Tanfield said, It was so adjudged in the Kings Bench, between Throgmorton and Burfind. Cro. 3. part. 818.

Questions

Questions of Title of Land (except by special order of the Judges in some cases) are to be tryed in the County where the Land lies, for the Law is, that all real and mixt actions, as Wast, Ejectment, &c. must be brought in the County where the Land is. But Debt, Detinue, Account, Actions of the Case, Battery, &c. are of their own nature Transitory, and yet they ought to be laid and tryed in their proper County, where the fact was done, unless the Court order the contrary, for some Special reasons; and if they are laid out of the proper County, daily practice tells us the Court may alter the venue upon Affidavit, of the true place of the fact.

Where the Land doth ly.

Transitory Actions.

All Criminal matters are to be tryed where the offence is committed.

Criminal matters.

If the Venue arise in two Counties, the Jury upon 2. Venire facias shall come from both, 6 out of one County, and 6 from the other. Cro. 3. part. 646. but by consent of parties, entered upon Record, it may be by 5. out of one, and 7. from the other, as appears, Cro. 3. part. 471. where in Replevin, the Defendant shews for Damage feasant, The Plaintiff by his Replication, claims common by Prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Mannor

This is called a Joynder of Counties.

Finch. 410. Jury out of two Counties.

But out of more than two Counties it cannot be made.

of D. in the County of Gloucester, and issue thereupon, and 2 Venire facias awarded to the Sheriffs of the several Counties, and now 7. of the County of Worcester appeared, and 5. of Gloucester. And although there ought to have been 6. Sworn of each County, to try that issue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the assent of parties, those 12 who appeared, by advice of all the Justices, were sworn, and tried the issue. And it was commanded that this Assent should be entered upon Record; for otherwise it would be a strange Precedent.

In an Assise of Common in Confinio Comitatus, and the issue be, whether he had Common by prescription in Land in one County, appendant to a Mannor in another County, this shall be tried by both Counties.

The same Law is in Trespasse brought in one County (which cannot be in confinio) upon such an issue, the Tryal shall be per ambideux Counties. 49 E. 3. 20. See Rolls tit. Tryal, 599. &c. many cases where the Jury shall come from two Counties.

In an Action upon the Statute of Marlebridge, for taking a distress in one County and chasing in another County, upon not guilty, the Tryal shall be only by the County where the chasing is, for this is all the cause of the action. 4 H. 6. 4. In

In Escape upon an Arrest in one County, Escape:
and an Escape in another County, upon
not guilty, this shall be tryed, where the
Escape is laid, for the action is upon the
Escape. Rolls ib. 602.

In an Action of Trover, apud Paxton in Com. Hunt. the Defendant pleads a Bargain and Sale, apud Royston in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt. The Plaintiff saith, that he was possessed of those Goods, apud P. in Com. Hunt. and that J. S. there stole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he sold them to the Defendant, as he hath pleaded: The issue was upon the Sale made by Covenant, &c. And it was tryed in the County of Hunt. and found for the Plaintiff. And it was moved to be a mis-tryal, for it ought to have been by a Jury of the County of Hertford, or at least, wise by a Jury of both Counties; But it was adjudged to be well tryed because the Sale is confessed, and the Issue is upon the Covenant alledged in Hertford, Cro. 3. part. 511.

Covenant in
P. to sell at R.
tryed at P.

In Debt upon a Bond in London, the Defendant pleaded an Usurious Contract in the County of Warwick; the Plaintiff replied, that the Bond was made upon good consideration, Absque hoc, that it was made
for

Usurious Con-
tract in ano-
ther County.

A Dures shall
be tryed
there, not
where the
Action is
brought.

for such Usurious Contract: the Tryal
shall be in the County of Warwick; for
the Bond is confessed, and the usury in
Warwick is only in question; so if the issue
be, whether the Deed were made by Dures,
the Tryal shall be where the Dures, and
not where the Deed, is supposed to be
made. Cro. 3. part. 195.

Surrender.

Where issue is taken upon a surrender,
it shall be tryed where it was alledged to
be done, and not where the Mannor is, of
which the Copyhold is holden. ib. fo. 260.
Br. tit. Visne 114.

Ward or
Hundred, no
good Visne.

In an Assumpsit laid at London in Warda
de Cheape, the Venire was De parochia de
Arcubus in Warda de Cheape, whereas no
Parish was mentioned before in the Count, &
adjudged that the Venire was ill laid in the
Count, for a Venire facias may be of a Town,
Parish, Mannor, or other place known,
but not of a Hundred or Ward, ib. and so
it is adjudged, ib. Cro. 1 part. 165. for the
Ward in a City, is but as the Hundred in a
County. The Parish in London is in lieu
of a Will and the Ward of a Hundred. Roll.
tit. Tryal 620, 621, 622. vide hic apres.

City.

Where the Visne is laid to be at a City,
in an Action brought in a superiour Court,
or within the City, though it be both a
City and County, the Venire facias may
be

be de viciner. Civitatis, Lach. 258. Though it hath been held not good, but that the Venire facias must be de Civitate, leaving out Viciner. as you may read in Scamf. 155. But now the Case in Cro. 2. part. 308. and Bulstr. 1 part. Rolls 622. 129. say, that all Venire facias's are awarded de viciner. Civitatis, which is intended as well de Civitate it self, as de viciner. infra Jurisdictionem of the City. And so it is, de viciner. Civitatis, or de viciner. or de Civitate Coventry, Eborum, Norwich, Sarum, Bristow, Exon, and all other Cities which are Counties in themselves. In all places besides London, no mention is made of the Parish or Ward. Ib. 493. But in London the Parish and Ward is mentioned. And therefore it was adjudged, Cro. 2. part. 150. That it was not good to alledge any thing done in London generally; But it must be, in what Parish from which a Venire may be; But where a thing is laid in a City, in alia Warda there, and the Venire facias is from the City only, it is well, because it shall be intended there be no more Wards in the same City. Cro. 3. part. 282.

Rolls 622.
623.

So in all inferior Courts.
Stiles 2.
March 125.

London.

City.

In an action against the Hundred upon the Statute of Winton, &c. upon the Roll the Venire facias is awarded of Bradley quod est proximum Hundredum, and the Venire facias is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one. Roll. iii. Tryal 598.

Hundred.

If a thing be laid done, apud Bristol, viz. in Warda Sanctæ Mariæ in Warda de Ratliff, and the Venire facias is de Warda de Ratliff, this is not good. ib. 619.

But if it be alledged in a Ward in the City of Bristol, &c. the Venue shall be of the Ward, not de Civitate.

Ward.

A Venire facias was awarded from T. and not de vicinet. de T. and for this cause resolved to be ill, and not amendable. Cro. 2. part. 399. Bro. tit. Ven. fa. 8.

De vicinet.
left out, ill.

Where the
Land lies.

If the issue be, Si rex concessit per litteras patentes, The Tryal shall be, as hath been said, where the Land lies, and not where the Patent was made, because the Patent is of Record; and if it be traversed, it shall be tryed by the Record, and therefore the issue being upon non concessit, the issue is not upon the Patent; but where the issue is upon non concessit, or non dimisit, of a thing which passeth by Deed, the Tryal shall be where the Grant or Demise is alledged. But of a Feoffment, or Lease for life pleaded, the issue being non Feoffavit, or non dimisit, Liberty ought to be made, and therefore the Tryal shall be where the Land lies. Cro. 2. part. 376. 3. part. 259.

Where the offence is laid in the Count to be in one County, and the Justification in another County, and the Plaintiff replies, de injuria sua propria, &c. The Visne shall be where the Justification is alledged; As, one Example for all, to illustrate. In an Action upon the Case, for words supposed to be spoken at Bridg-North, in the County of Salop, the Defendant pleads, that he spake them as a Witness upon his Oath, upon an issue tryed at Chard, in the County of Somerset. The Plaintiff replies de son tort demesne, &c, And thereupon it was tryed by a Venire facias of Bridg-North, And Error thereof assigned, because it ought to have been by a Visne of Chard, where the Justification arose, and it was held clearly to be a mis-tryal; and not aided by the Stat. of Jeofailes, wherefore the Judgment was reversed. Cro. 3. part. 468. 261. 870. More 410.

Where the Action is laid in one County, and the Justification in another, the Tryal shall be where the Justification is.

Replevin, taking 2 Horses at such a place in Denford in Com. Northampton, the Defendant makes Con sans as Bayliff to the Lord Mountague of his Mannor of S. which Mannor is holden of the Honour of Gloucester, and that the place in which, &c. is within the said Honour, and alledges a Custome within the said Honour, on which Custome the parties were at issue, and the Venire facias was from Denford the place of taking.

D

which

which was moved after Verdict, for that the Venue was not so large as the issue, which was the Honour, and of this opinion was the whole Court of C. B. Pasch. 13 Car. 2. Hull vers. Banning.

Honours.

But the great question was, whence the Venue should arise in this Case, and per Bridgman Ch. Just. and Just. Hide, in no Case can a Venue arise from an Honour; and Ch. Just. said, he had caused the Prothonotaries to search for Precedents, and they could not find that ever a Venue did arise from an Honour, which is but a bundle of services, and an incorporeal thing, from which no Venue can come, and yet an Honour may have demesnes, as the Honours of Grafton and Hampton have, but Gloucester not.

Ch. Just. and Just. Hide, seemed that the Venue should be de Corpore Comitatus. Hob. 266. 249. But when the Court was after moved for their opinion, they had them take a Venire facias at their peril, and would give no opinion.

An action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff, a walk called Shroob-walk in the Forest of — in Com Northampton, and Covenanted for peaceable enjoyment, &c.
and

and he was ousted per Earl of Northampton who had right, on which Right issue was joyned, and the Venire facias was from Shrobswalk.

Per Cur. It's not good, for it appears by the Record that Shrobswalk is not a Vill; but if the Obligation had been laid to be made at Shrobswalk, the Venue should arise from thence as a Vill. Inter. Sturt & Bales Pasch. 19 Car. 2. E. R.

The Venue shall follow and be according to the issue. Out of what County.

As for words in Warwickshire Thou art a Thief and stolest my Iron: The Defendant justifies & says, the Plaintiff stole the Iron in Leicestershire, and brought it into Warwickshire, and therefore he spake the words in Warwickshire. If the Plaintiff replies de injuria sui propria absque tali causa, the Jury shall come from Leicestershire, to which the absque tali causa refers, for the words are acknowledged. See Rolls iii. Tryal 598. 623. *Vide hic ante & postea.*

When part of the matter to be inquired of, is in one County or place, and part in another, the Tryal shall be there where the best Conusans of the matter may be.

As in an action upon the Case, the Plaintiff declares that the Defendant took the From the place best known.

Horse of A. at S. and sold him at D. to the Plaintiff as his proper Horse, and afterwards A. retook the Horse. If the Defendant plead that the property was in him at the sale, upon which issue is joyned; The Venue shall be de S. where the taking is supposed, for there the property may be best known; which is only in question. 42. Aff. 8. see several cases in Rolls ib. 603. under this head.

Where the
Counties
cannot joyn.

If the issue be whether L. did ride from London to York, and from York to London 5 times in six days, this may be tryed by London only. Although part of the matter to be inquired of was done in each County.

In an action of Battery in London, if the Defendant justifies in defence of his possession in D. in Essex, and the Plaintiff says de son tort demesne sans tiel cause, this ought to be tryed by both Counties if they might joyn, because he may be found guilty at another day, and therefore because they may not joyn, this may be tryed in Essex.

Of Assizes in confinio Com. See. 1 Inst. 154.

In case for words in one County, if the Defendant justifie in another County, and the Plaintiff reply de son tort demesne, &c. although the Counties ought to joyn, if they could, and the Justification is principally put in issue, yet the Tryal may be in either County at the Election of the Plaintiff.

In

In Ejectment in London upon a Lease made there of Land in Mid. if the Defendant plead not guilty, this may be tryed in London, because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in Mid. and judgement affirmed in a Writ of Error. See Rolls tit. Tryal 602.

Rolls tit.
Tryal 620.

London cannot joyn with another County. 49 E. 3: 20.

Two Counties may joyn although they be not nearest, nay though 20 Counties be between them. Finch French. 59. 1 Inst. 154.

But if it be of a Lease at Ickford of Land in Bury in Suff. the Venue must be of Bury not of Ickford. ib. 619.

If the issue be taken upon the name or condition of the person, this shall be tryed in the County where the Writ is brought, 21 E. 4. 8. for this may be well known there. Rolls ib. 613.

Where the Writ is brought.

Where the issue is to be tryed upon a point which shall be tryed by two Counties, and one cannot joyn with the other, this shall be tryed, where the Writ is brought. 21 E. 4. 8. but for this see before where the Counties cannot joyn.

In Debt in London against I. S. of D. in Essex, if the Defendant saith that he was at S. in Essex at the time of purchasing the Writ,

Where in other County than where the writ is brought.

Writ, and not at D. this shall be tryed in Essex, and not where the Writ is brought, for none can know where he dwelt so well as the County of Essex. 12 H. 6. 5.

Vide many cases in Rolls ib. 6. 5. &c. about this matter.

Where the
escape was,
and not
where the
Arrest was.

In an Action of the Case against a Sheriff, upon an escape in London, and the Arrest laid to be in Southampton; adjudged, that the Visne shall be where the escape was, because that is the ground of the Action, and not where the Arrest was: Cro. 3. part. 271.

* Rectoria.

Castle.

Rolls tit. Try-
al 621.

In Debt upon an Obligation, payment was pleaded, apud domum mansionalem Rectorie de Much-Hadam, and the Venire facias was de vicineto de Much-Hadham, where it ought to have been de vicinet. Rectoria de Much-Hadam; but it was adjudged good, because Much-hadam is here intended a Vill. ib. 804. So you see, that where a thing is alledged to be done at the Capital House * of D. there the Venire shall be of D. For that is intended to be all one with the Vill. But where it is at the Castle of Hertford, &c. there the Venire facias shall not be de vicineto de Hertford; but de Castro de Hertford, for Castrum Hertford is intended a distinct place by it self; and so of all Castles. Cro. 2. part. 239. More 62.

A Venire facias may be awarded of a Castle Rolls 618.

Where the issue is not parcel of the Mannor of D. or the Custom of a Mannor is in question, the Venire ought to be of the Mannor. Hob. 284. Cro. 2. part 327. If the Mannor be laid to be in a Vill, the Venire facias may be of the Mannor in the Vill, as de vicineto manerii de Stansted-Hall in Windham. Cro. 2. part. 405. More 851. Arundels Case. li. 6. 14. Mannor. Rolls ttr. Try. al 621.

The Venue cannot be of a scite of a Mannor. Rolls ttr. Tryal 618.

In the Common Bench, in Trespass, for taking away a Bag of Pepper, the Defendant justified as Serbant of the Mayor and Commonalty of London, for Wharfage due to them, by the Custome of London, which the Plaintiff refused to pay. The Plaintiff replied, that the Custome did not extend to him, because he was a free-man of the City, and ought not to pay Wharfage, to which the Defendant rejoyned, that the Custom extended to him, as well as to strangers; upon which, issue was joyned. London.

Resolved, 1. That the issue should be tryed per Pais, not by the mouth of the Recorder, because he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the cause. Re: order.
2. That

Where the
Tryal shall be
by the Coun-
ty next ad-
joyning.

2. That the Venire facias should not be awarded to the Sheriffs of London, nor Middlesex, because the Tryals there, are by Free-men. But it shall be to the County next adjoyning, viz. to the Sheriff of Surry. So where any City is concerned, the Venire facias shall not be directed to the Officers of the City, but to the County next adjoyning. Hob. 85. Stiles 137. More 871. vide hic cap. 2.

If the issue concern the Mayor and Commonalty of a Town, the Array shall be made all of Forreigners. 31. Affise 19. vide Rolls tit. Tryal 597.

So if the issue concern the Mayor and Commonalty, &c. although they are not parties, yet the Venire facias shall be directed to the Sheriff of the next County. 15 E. 4. 18.

Where a man
lends his
horse in one
place, and
he is spoiled
in another,
Visne where
he is spoiled.

Where a man lends a Horse to another to till his Land, and the Horse dies with excessive Labour, the Visne shall be from the place where the excessive labour was, and not where the delivery was. More 887. vide Hob. 188. Rolls tit. Tryal 615. pasch. 22 Car. 2. B. R. Horsley versus Potter. An action of the case was brought for misusing an Horse, in Itinere; the Contract was laid at Swafham in Norf. and the riding to Peterborough rough

rough in Northamptonshire, where the Horse died, it was tryed in Norf. and the Court seemed that it ought to have been tryed in Northamptonshire, where the damage was done, and not where the contract was made, but it was aided by the Stat. of Jeofailes. 17 Car. 2. cap. 17. (after Verdict) that Statute being then in force.

Where a promise is laid in one place, and the breach in another, the Visne must be according to the event of the issue, whether it be taken upon the promise, or breach. But if no place be alledged for the breach, and issue be taken upon it, the Visne must be from the place of the promise, which shall be intended right, where the contrary appears not, see Godbolt 274.

Promise in one place and breach in another.
Visne guided by the issue:

Easter 39 Eliz. In the Kings Bench, Trespass, Assault and Battery, en Wilts, continuing the Assault in Middlesex, and adjudged that the Jurors shall come out of both Counties. More 338.

The name of a Mannor, or Land, or other local thing, shall be tryed where it lies, because it is local; but the name or addition of a person, shall be tryed where the Action is brought, because this is transitory. Bro. tit. Visne 7. lib. 6. 65.

Where the
Land lies.

In Covenant upon an Indenture of Demise of the Rectory of Stoken Church, in the County of Oxford, That the Defendant had good Power and Authority to demise : The Indenture was alledged to be made at London, and the Venire facias was awarded to the Sheriff of Oxon, and this being assigned for Error, Judgement was affirmed, and this adjudged to be good. More 710. because the Rectory was in Com. Oxon. vide P. 8. 45.

Where the
Land lies and
not where the
Writ, &c.

In Debt upon an Obligation in one County to perform Covenants in a Lease, and the Land and payments were in another County ; The Tryal shall be where the Land and payments are. 44 E. 3. 42.

In Debt upon a Lease in one County, and the payment of the Rent upon the Lease limited there also, but the Land was in another County, and the payment upon the Land ; this shall be tryed where the Land and payment was, for he was bound to pay this there upon the distress. ib.

But the Tryal should have been where the Writ was brought, if the payment had not been alledged to be where the Land was. ib.

Where the
Land and
Writ, &c.

If Debt be brought for Rent upon a Lease for years, and the Action is brought, where the Land is, but the Deed of the Lease bears Date

Date in another County, the Tryal shall be where the Land and Writ is brought. 45 E. 3. 8. The issue being whether the Lessor had a conditional estate or not, & so a lawful eviction.

If the issue be in an Assise whether the Tenant be the eldest Son of J. S. and his birth is alledged in another County, yet this shall be tryed where the Land is. 46. Ass. 5. Where the Land lies and where not.

If an infant bring an Assise, and a release of his Ancestor is pleaded against him dated in another County, this must be tryed where the Release is dated, and not by the Assise, although the Plaintiff be an Infant, and the circumstances are to be inquired. 21 E. 3. 20. See Rolls ib. 611.

In case if the Plaintiff declare upon a trust at D. and of a wrong at S. upon not guilty, if it appear the trust is not material, the Venue shall only come from S. and not from both places, one not being material. Where from two places in one County, and where not. Vide hic. cap. 10.

In case for stopping a way from such a place, to such a place, and that the obstruction was at D. upon not guilty the Venue shall not come from D. only, for all the way is put in issue.

In Trespals in one Vill, and a release pleaded dated in another Vill, within the
R 2
same

same County, upon non est factum, this shall be tryed per ambideux. Rolls ib. 624. vide hic ante. See Rolls ib. 615. many cases about this,

De Corpore
Com.

Where the Venue cannot be from a Vill, Hamlet or lieu conus, there it may be de Corpore Comitatus, for if it might not be so, the cause could not be tryed.

A lieu conus is a Castle, Mannor or other notorious place well known, and generally taken notice of by those who dwell about it, and not a Close or Pasture of ground, or such like place of no repute.

A Custom of a County is to be tryed de Corpore Comitatus, for the Custom runs thorough the whole County.

Parish.

Where the Parish is named by way of denotation, or explanation of the place where the Fact is alledged to be done, as at the Parish Church of Hawk Hock, nol, there the Verine facias shall be of the Town, not of the Parish. Bullstr. 1 part. 60, 61.

Town.

If the Fact be alledged in Kingstreet, in the Parish of St. Margarets, in Com. Mid. you have already heard that the Visne shall be from Kingstreet, because it is intended to be a Town; but where it is alledged to be done at Grays-Inn-Hall, or Lincolns-Inn-Hall,

Hall, &c. in Holborn, the Visne shall be from Holborn, which is the Town; for as Yelverton said, it was never heard of any ^{Inns of Court.} Venire facias to be had of any of the Inns of Court, Bulstr. 2. part. 120. especially of the ^{Not from} Hall, because it cannot be of a House, much ^{house or hall.} less of a Hall.

In Execment upon a Demise made at Denham of Lands in parochia de Denham predict. The Visne may be of Denham, or of the Parish of Denham, because Denham and Parochia de Denham predict. are all one by intendment of Law. Bulstr. 2. part. 209. More 709. Hob. 6. But when it appears by the Record, or is intended that the Parish is more spacious than the Town, as the case in More 857. where in Execment the Lease was alleged to be made at Bredon, of Pythes in W. and W. Hamlets within the Parish of Bredon, there the Venire facias must not be of Bredon, but of the Parish, because it appears, that the Parish extends further than the Town. Hob. 326.

Parish.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Lessor, as against the Lessee, or his Executors, for Accrueages due in the lifetime of the Testator, the Visne may be laid in any place; but where the Action is brought upon the privity in Estate, as against the Assignee of the Lessee, or his Executors, for Rent

For Rent where the Land lies, and when not.

Kent due after the Testators death, the Visne must be, where the Lands lie. Lach. misprinted, 197. 262. 271. v. li. 3. 24.

And so it was adj. in case of Hall and Arnold, Mich. 1656. B. R. and it was further adj. there, the Case being of a Lease made at London of Lands in Monmouthshire, rendering Rent payable at the Old Exchange, for which action is brought by the Heir. If there had been no place of payment, the Heir must have brought his Action where the Lands lie, but the place of payment being in another County, he has his Election, as on a Lease for years of Lands in two Counties.

Debt for rent
of Land in
another
County.

Walkers Case, in Debt upon a Lease of Land in another County, Nihil debet. Shall be tried where the action is brought. Br. rit. Visne 119. Vide pag. 93.

Mannor.

In Replevin brought by Syde, against Harly, for taking a Distress at Baildon, the Defendant made Conusance as Bayliff, because that locus in quo, &c. was holden of W. H. as of his Mannor of Baildon, and upon issue, hors de son fee, the Venire facias was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Mannor, as the Town, The Court adjudged it to be well enough, for that the Court shall not intend the

the Mannor was larger than the Town, because it both not appear so to be, although possibly it might, as like the Case of Town and Parish. Hob. 305. 326.

If the Sheriff return that there are no Freeholders of that Visne, or if the Visne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the men are privileged from serving on Juries out of that place, as the Isle of Ely, &c. the Plaintiff may pray a Venire facias of the Visne next adjoining, and if the Visne be in Wales, (ou brieve le Roy ne Court) the Venire facias shall be directed to the Sheriff of the next English County, to cause the Jury to come de propinquiori Visne of his County, to the Visne in Wales adjoining: For the Court shall not be ousted of the Plea. Fitz. Abridg. tit. Visne 8. Jurisdic. 24.

Visne next adjoining in what Cases.

Cinque Ports.

Wales.

In an action against a Hundred, the Venire facias may come from the next Hundred generally.

In Trespass, if the Defendant plead not guilty to part, and to the residue a Plea, which causes the Tryal of that to be by a Jury de Prochein Hundred, The Venire shall be awarded al Prochein Hundred, for both issues, because there ought not to be two Venire facias in one action. vide Rolls tit. Tryal 596.

In

In an Appeal of murder committed in the Cinque Pairs, although the King be concerned, yet because this is betwixt common persons, the Venire facias to the next adjoyning Vill. *ibidem*.

Ireland.

If the issue be joined of a matter in Ireland, this shall be tryed by a Jury of the next County in England. *ib.*

Prochein Hundred.

If the issue be to be tryed by the Venue of a Mannor, and the Plaintiff suggests that he is Lord of the Hundred in which the Mannor is, and that all within the Hundred are within his Distress, if the Defendant acknowledge this, the Venue shall not be de Corpore Comitatus, but of the next Hundred, for if it should be de Corpore Comitatus, this should be tryed by the Tenants of the Mannor. Rolls *ib.* 667.

Visne mis-
awarded in
part.

If the Visne is in some part mis-awarded, or sued out of more places or fewer than it ought to be, so as some place be right named, this is aided by the Stat. of Jeofails, which hath ended the differences, in many cases reported in our Books, concerning this point, wherefore I purposely omit them.

Infamy where
the Land lies.

Error, for that the Judgment was given by default against the Defendant, being an Infant, upon issue that he was of full age, adjudg-

adjudged, that the Tryal should be in Norfolk, where the Land was, and not in Middlesex, where the Action was brought. Cro. 3. part. 818.

If the Visne cometh from a wrong place, yet if it be per assensum partium, and so entred of Record, it shall stand; for Omnis Consensus tollit errorem. 1 Inst. 125. May be out of a wrong place by Consent.

Holmes vers. Sanders Hill. 22, 23 Car. B. R. Error to reverse a Judgement given in the Kings Bench in Ireland, in Debt for Rent brought by the Assignes of a reversion, the Plaintiff declared of a Lease of Land in such a Parish in the Suburbs of Dublin, on nil debet pleaded, the Venire facias was from the said Parish in Civitate Dublin, and Judgement there per Plaintiff, it was assign'd for Error, because the Land lies in the Suburbs of the City, and the Venire facias was from a Parish in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchise of the City, as Fleetstreet is within the Suburbs of London; but the Strand not, though so reputed.

Note, It was adjudged, Error in an Inferior Court, that the Venire facias was awarded secundum consuetudinem Curie which ought to be per Curiam. Reader vers. More, Mich. 1650. B. R.

C A P. IX.

Challenges.

You have already seen of what Vigne the Jury ought to be : The next thing to be considered, is concerning Challenges.

Challenge.

Challenge is a word common as well to the English as to the French, and sometimes signifyeth to claim; and the Latine word is vendicare; sometime in respect of revenge to challenge into the field, and then it is called in Latine, vindicare or provocare; Sometime in respect of partiality or insufficiency, to challenge in Court persons returned on a Jury. And seeing there is no proper Latine word to signifie this particular kind of challenge, they have framed a word anciently written Chalumniare, and Columpiare, and Calumpniare, and now written Calumniare, and hath no affinity with the verb Calomniare, or Calumnia, which is verbed of that, for that is of a quite other sense, signifying a false accuser, and in that sense, Bracton useth Calumniator to be

be a false accuser : but is derived of the old word Caloir, or Chaloir, which in one signification is to care for, or foresee. And for that to challenge Jurors, is the mean to care for or foresee, that an indifferent Tryal be had, it is called Calumniare, to challenge that is, to except against them that are returned to be Jurors, and this is his proper signification : But sometimes a Summons, Sommonitio is said to be Calumniata, and a Count to be challenged, but this is improperly. And forasmuch as mens Lives, Names, Lands, and Goods, are to be tryed by Jurors, it is most necessary that they be Omni exceptione majores, and therefore I will handle this matter the more largely.

A Challenge to Jurors is twofold, either to the Array, or to the Polls : to the Array of the principal Pannel, and to the Array of the Tales. And herein you shall understand, that the Jurors names are ranked in the Pannel one under another, which order or ranking the Jury, is called the Array, and the Verb, to Array the Jury, and so we say in common speech, Battail Array, for the order of the Battail.

Challenge is twofold.

To the Array.

Array. And this Array we call Arraiamentum, and to make the Array, Arraiare, derived of the French word Arroier ; so as to challenge the Array of the Pannel, is at once to challenge or except against all the persons so Arrayed or Impannelled, in respect of the

Partiality oꝝ default of the Sheriff, Coroner, oꝝ other Officer that made the Return.

Principal
Challenges.

And it is to be known, that there is a principal cause of challenge to the Array; a challenge to the favour: principal, in respect of partiality, as first, if the Sheriff oꝝ other Officers be of kindred oꝝ affinity to the Plaintiff oꝝ Defendant, if the affinity continue. Secondly, If any one oꝝ more of the Jury be returned at the denomination of the party, Plaintiff oꝝ Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, all the Array shall be quashed. Thirdly, if the Plaintiff oꝝ Defendant have an Action of Battery against the Sheriff, oꝝ the Sheriff against either party, this is a good cause of challenge. So if the Plaintiff oꝝ Defendant have an action of Debt against the Sheriff, (but otherwise it is, if the Sheriff have an action of Debt against either party) oꝝ if the Sheriff have parcel of the Land depending upon the same Title, oꝝ if the Sheriff oꝝ his Bayliff which returned the Jury, be under the distress of either party; oꝝ if the Sheriff oꝝ his Bayliff be either of Counsel, Attorney, Officer in fee, oꝝ of Robes, oꝝ servant of either party, Gossip, oꝝ Arbitrator in the same matter, and treated thereof. And where a subject may challenge the Array for unindifferency, there the King, being

Tryals per pais.

ing a party, may also challenge for the same cause, as for kindred, or that he hath part of the Land, or the like; and where the Array shall be challenged against the King, you shall read in our Books.

In Ejectment, the Plaintiff suggesteth that his Lessor, the Sheriff and Coroners were Tenants to a Dean and Chapter, whose Interest was concerned, and prayed the Venire facias to Elisors, and had it, being confessed by the Defendant, and the Court took it a principal challenge. v. Hut. 24. More 470. Roll. rep. 328. Duncomb and Ingleby, Trin. 15 Car. 2. B. R.

A prayer to Elisors in Tryals at Bar may be at the suit of the Defendant or Plaintiff, but in Nisi prius at the prayer of the Plaintiff only, and per Cur. it is a principal challenge that the Plaintiffs Lessor is Sheriff or kindred, and if the Plaintiff doth not pray, &c. the Defendant may challenge the Array at the Assizes. Lord Brookes Case, Trin. 1657. B. R.

'Tis a good challenge to the Array, that the Array is made and returned by 2 Coroners, only when there are four in the County, and that the Writ is returned by one of the Sheriffs of London only. So if a Bayliff return them that are out of his Franchise, or if an Array be to be of persons out of a Fran-

Franchise & Guildable, and the Bayliff return them, for the Sheriff ought to make it; and that some of the Pannel were returned by the Bayliff of a Franchise, where the whole Pannel is returned as Array by the Sheriff, this is a good challenge to the Array, for otherwise the parties would lose their challenge to the Array made by the Bayliff. Rolls iii. Tryal 636.

By what person.

If the Defendant sue the Writ of Habeas Corpus by Proviso at the return, the Plaintiff may challenge the Array for kindred between the Defendant and the Sheriff. D. 15 El. 319. 13.

What Consanguinity is sufficient.

D. 15 El. 319. The Array was quashed although the Sheriff was the Nause in descent, and the Tenant in the 7. descent from the Ancestor of whom both descended. Cousin to the parties wife, although herself no party. So if the wife be dead, if issue be alive. These are good challenges to the Array.

For affinity.

Alliance to one party is a good challenge.

At what time.

If the Sheriff be allied at the making of the Pannel, and be dead at the challenge, yet this is a good challenge. 'Tis no challenge that the Sheriff became of him after making the Pannel.

'Tis

'Tis no challenge to the Array if all the Jurors be of affinity.

It may be after a Tales prayed, for no challenge can be until the Jury is full. If the suggestion of Coustnage to have the Venire facias to the Coroners be denyed, and the Venire facias is awarded to the Sheriff, the same challenge shall not be allowed to the Array, but any other cause may be alledged, than what was before denyed.

Favourably made by the Sheriff or his Bayliff of the Bayliff of a Franchise, is a good challenge. That the Sheriff is within the Distress of a party, or servant to the Plaintiff, Of the Robes of the Plaintiff, was Arbitrator for a party, is procurator and maintainer of a party, That the Sheriff purchased part of the Land in question, That the Pannel was made by the Bayliff of the Franchise of the other party. These are good challenges to the Array.

'Tis no principal challenge that one party is Tenant, or servant to the Sheriff, but it is a good challenge for favour.

It is a good challenge to the Array, That the Sheriff made the Array, or put a Juror into the Pannel at the denomination of any of the parties in favour to them, or of their

Tryals per pais:

their servants, or of one interested, or of a maintainer, or of the Counsel, or of a procurator.

Not if strangers by the Sheriffs leave make the Pannel, or it be made at the request of both parties.

For malice.

'Tis a good challenge to the Array, that one of the parties has brought an action of Debt against the Officer that returns the Pannel, or that there is a difference betwixt the Officer and the party, that the Officer killed his servant.

But not that the Officer has Debt against the party, for he may demand his Debt without malice.

How and in what manner the Challenge is to be made.

The Challenge ought to be quod tempore Pannelli prædicti Arraiati, the Sheriff was Cousin to the Wife of the Defendant, &c. not afterwards, nor before, unless you aver that she was alive or had issue at the making the Pannel.

What Coun-
terplea of a
Challenge is
good and
how to be
pleaded.

If the Challenge be taken for Cousinage, it ought to be shewen coment Cousin, but in such a challenge to be a Juror 'tis not necessary to shew coment Cousin.

The mannor and conveiance of the Cousinage alledged in a challenge is not transferable.

verfable. You may traverfe the Coufinage
prou without modo & forma. If the Chal-
lenge be that the Sheriff was Coufin to the
Plaintiff, or within his diftreff; 'tis no
Counterplea to fay he is likewise of kin to
the Defendant, or within his diftreff
also.

Where the King is party to the ifue, no challenge shall be to the array for favour, Where the King is party
38 Aff. 19.

Otherwife if the Sheriff be Maletent
of the Kings Crown, or fuch menial fer-
vant.

If it be prefented that I. S. hath made a
miffance to London and le gentz, 'tis no chal-
lenge to the array, to fay the Sheriff of Mid-
dlesex is deputed and removable by the Com-
monalty of London, becaufe this is the fuit
of the King.

The King may make his challenge that
the Sheriff is within the parties diftreff,
although every fubject owes greater favour
and obedience to the King, by reason of his
Allegiance, than to any Lord by reason of
Tenure.

In a writ of Right or any other writ, a Baron of the Realm may excuse himself. What persons may be im-pannelled.

In a writ of Right the Inquest ought to be all Knights. A Banneret may be impannelled in this writ; so may a Serjeant, if there be not Chivalers convenient.

In an attaint upon a recovery by false verdict in an Assise, some Knights ought to be returned, and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By default of the Sheriff, as when the array of a Vannel is returned by a Bayliff of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the party shall lose his challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

Where there must be a Knight returned of the Jury.

If a Peer of the Realm, or Lord of Parliament be demandant or Plaintiff, Defendant or Defendant, there must a Knight be returned of his Jury be he Lord Spiritual, or Temporal, or else the array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the array shall be quashed against.

against all. So in an attainr, there ought to be a knight returned to the Jury.

If two Peers sue as Gentlemen, and admit themselves so in pleading; 'tis no challenge to say, no knight is returned; for the Sheriff is in no fault.

And when the King is party, as in traverse of an Office, he that traverseth may challenge the array, as hereafter in this Section shall appear; and so it is in case of life: And likewise the King may challenge the array, and this shall be tried by Tryors according to the usual course. The array challenged on both sides shall be quashed. Where the King is party.

And if two strangers make a Pannel, and not in favourable manner for the one party or the other, and the Sheriff returns the same, the array was challenged for this cause, and adjudged good.

If the Bayliff of a Liberty return any out of his Franchise, the array shall be quashed, as an array returned by one that hath no Franchise shall be quashed.

Challenge to the array for favour: He that taketh this, must shew in certain the name of him that made it, and in whose time, and all in certainty: This kind of

Challenge to the favour.

Challenge being no principal challenge, must be left to the discretion and conscience of the Tryors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no danger of his Tenant, but e converso it is a principal Challenge; but in the other he may challenge for favour, and leave it to tryal. So affinity between the Son of the Sheriff, and the Daughter of the party, or e converso, or the like, is no principal challenge, but to the favour; but if the Sheriff marry the Daughter of either party, or e converso, this (as hath been said) is a principal Challenge, or the like. But where the King is party, one shall not challenge the array for favour, &c. because in respect of his allegiance, he ought to favour the King more. But if the Sheriff be a Vassal of the Crown, or other mensial servant of the King, there the challenge is good; and likewise the King may challenge the array for favour.

For the King.

Note, upon that which hath been said it appeareth, that the challenge to the array, is in respect of the cause of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in respect of the persons returned, where there is no unindifference or default in the Sheriff, &c. for if the challenge to the Array be found against the party that takes it, yet he shall

shall have his particular challenge to the Polls.

In some Cases a Challenge may be had to the Polls, and in some Cases not at all. Challenge to the Polls, is a challenge to the particular persons, and these be of four kinds, that is to say, Peremptory, Principal, which induce labour, and for default of Hundredors. To the Polls.

Peremptory, this is so called, because he may challenge peremptorily upon his own dislike, without shewing of any cause, and this only is in case of Treason or Felony, in favorem vitæ; and by the common Law, the prisoner upon an Indictment or Appeal, might challenge thirty five, which was under the number of three Juries; but now the Statute of 22 H. 8. the number is reduced to 20. in petite Treason, Murder and Felony; and in Case of high Treason, and Conspiracy of high Treason, it was taken away by the Stat. of 33 H. 8. but now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the prisoner shall have his challenge to the number of 35. and so it hath been resolved by the Justices, upon conference between them in the case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any subject that is not a Peer of the Realm, is arraigned for Treason or Felony. But

No Challenge
of Peers.

But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tryed by his Peers, he shall not challenge any of his Peers at all, for they are not sworn as other Jurors be, but find the party guilty or not guilty, upon their Faith or Allegiance to the King, and they are Judges of the fact, and every of them doth separately give his judgment, beginning at the lowest. But a Subject under the degree of Nobility, may in case of Treason or Felony, challenge for just cause as many as he can, as shall be said hereafter. In an appeal of death, against divers, they plead not guilty, and one joyned Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

The Kings
Challenge re-
strained.

Note, that at the common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing cause, but only that they were not good for the King, and without being limited to any number, but this was mischievous to the Subject, tending to infinite delays and danger. And therefore it is Enacted, Quod de cetero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege: non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumnie sue, &c. whereby the King is now restrained.

Principal
Challenge to
the Polls.

Principal, so called, because if it be found

found true, it standeth sufficient of it self without leaving any thing to the Conscience or discretion of the Tryors. Of a principal cause of challenge to the Array, we have said somewhat already; now it followeth with like brevity, to speak of principal Challenges to the Polls, (that is) severally to the persons returned.

A principal Challenge is nothing else but such matter which proves evident favour, or enmity in the Jury; and therefore it belongeth to the Justices to draw the Jury, and not to leave the decision to Tryors, 21 E. 4. 11.

Principal Challenges to the Poll may be reduced to four heads. First, Propter honoris respectum, for respect of Honour: Secondly, Propter Defectum, for want or default: Thirdly, Propter Affectum, for affection or partiality: Fourthly, Propter Delictum, for Crime or Delict.

To the Polls.

First, Propter Honoris respectum, As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquess, and Duke, for these in respect of Honour and Nobility, are not to be sworn on Juries; and if neither party will challenge him, he may challenge himself: for by Magna Charta it is provided, Quod nec super eum ibimus, nec super eum mittemus nisi per legale judicium

Principal Challenges to the Polls.

Propter honoris respectum.

A Peer may challenge himself.

Peers and Commons.

um parium suorum, aut per legem terra. Now the Common Law hath divided all the subjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Bishops, Counts, Earls, Marquesses and Dukes; The Commons are divided into Knights, Esquires, Gentlemen, Citizens, Freeman, and Burgeses: And in Judgement of Law, any of the said degrees of Nobility are Peers to another: As if an Earl, Marquess, or Duke, be to be tryed for Treason or Felony; a Baron, or any other degree of Nobility is his Peer. In like manner, a Knight, Esquire, &c. shall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Freeman, or Burgeses; so as when any of the Commons is to have a Tryal, either at the Kings Suit, or between party and party, a Peer of the Realm shall not be impannelled in any Case.

Challenge
Propter defectum.

Secondly, Propter Defectum,

1. Patriæ, as Aliens born.
2. Libertatis, as Villains or Bondmen, and so a Champion must be a Freeman.
3. Annui census. i. e. liberi tenementi.

First, what yearly Freehold a Juroz ought to

to have, that passeth upon Tryal of the life of a man, or in a Plea real, or in a Plea personal, where the Debt or damage in the Declaration amounteth to 40. Marks, Vide Littleton, Sect. 464. Secondly, this Freehold must be in his own right, in Fee simple, Fee-tail, for term of his own life, or for another mans life, although it be upon condition, or in the right of his Wife, out of antient Demesne; for Freehold within antient Demesne will not serve: but if the Debt or Damage amounteth not to 40. Marks, any Freehold sufficeth. Thirdly, he must have Freehold in that County where the cause of the action ariseth, and though he hath in another, it sufficeth not. Fourthly; if after his return he selleth away his Land, or if Cesty que vie, or his Wife dyeth, or an entry be made for the condition broken, so as his Freehold be determined, he may be challenged for sufficiency of Freehold.

See before,
cap. 7.
Quorum quilibet habeat
4. l. &c.

It seems before the Statute 2 H. 5. freehold of any value was sufficient, for there Freehold of 5. s. was sufficient. 3. H. 4. 4. by that Statute in all Pleas real and personal, where the Debt or damage, or both together amount to 40 marks, the Juror must have 40. s. Freehold. In an Amaine they must be able to expend 20. l. per annum.

In an accompt upon the Receipt of 100. s. if he count to his damage, 200. s. if the Juror hath but 20. s. or under 40. s. 'tis sufficient, because he shall not recover damages, and so this is not within the Statute 10 H. 6. 18. for the sufficiency of Jurors. See Rolls iii, Tryal 648.

A man seised of the Mannor of Dale enfeoffs a stranger upon condition to pay yearly to J. S. and his Heirs 40. s. Kent. J. S. dies seised of this Kent, and then his Heir takes it. Yet the Heir hath not sufficient Freehold.

Land to the value of 40. s. is given to Husband and Wife and the Heirs of their two bodies begotten, who have issue a son, the Husband gives the Land by fine to an stranger and his Heirs, and dies, the Wife enters, and dies seised, the son hath not sufficient Freehold to be a Juror.

A man seised of Land to the value of 40. s. within the County of Mid. and of Land to the value of 12. within the County of Suffex, and grants a Rent-charge of 40. s. issuing out of all the said Land to a stranger in fee, the Grantee hath sufficient Freehold to be a Juror in both Counties. See many speculative cases upon this subject, in Williams his Reading upon the Statute 35 H. 8. cap. 6.

4. Hundredorum: First, by the common Law in a Plea real, mixt, and personal, there ought to be four of the Hundred (where the cause of action riseth) returned for their better notice of the cause; for Vicini vicinorum facta præsuntur scire. And now since Littleton wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, although the Jury is double, yet the Hundredors are not double. Secondly, If he hath either Freehold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, if the cause of the action riseth in divers Hundreds, yet the number shall suffice, as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, if there be divers Hundreds within one Leet or Wape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper hundred, it sufficeth. Fifthly, if the Jury come de Corpore Comitatus, or de proximo Hundredo, where the one party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his notice remains; otherwise as hath been said for his insufficiency of Freehold,

Challenges
propter de-
fectum hun-
dredorum.

Hundredors.

No Hundre-
dors.

Tryals per pais.

hold, for his fear to offend, and to have Lands wasted, &c. which is one of the Reasons of Law, is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not dribe the other party to shew it. Eighthly, his Challenge for the Hundred is not simpliciter, but secundum quid; for though it be found that he hath nothing in the Hundred, yet shall not he be drawn, but remain præter H. that is, besides, for the Hundred, and albeit he dwelleth, or have Land in the Hundred, yet must he have sufficient Freehold.

Note, This challenge for want of Hundredors must be given in writing presently, and the other party is to demurr thereto, if opposed.

If a challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any sufficient within the Hundred, which is not within the Fee of the Plaintiff, although this be not returned by the Sheriff, and this be found true by Tryors, the Array shall be affirmed. 45. Ass. 1.

If the King be made party by aid prayer, and sufficient Hundredors do not appear nor are returned, yet the Pannel shall not be quashed, but a Tales of Hundredors shall be

he returned. But betwixt Common persons in such cases the Pannel shall be quashed, and this shall not be only a challenge to the heads. 25 E. 3. 43.

If the Sheriff return quod non sunt plures del' Hundred, he shall take of the Hundred adjoining which shall be sufficient. 19 H. 6. 48.

If the Juror hath sufficient Land with in the Hundred, although he doth not dwell within the Hundred, yet he is a sufficient Hundredor. 9 H. 6. 66. nay though he dwell in another County.

If he be not Hundredor at the return of the Venire, but be at the return of the Distringas, yet this doth not take away the challenge.

After four are sworn, or after a challenge to the Polls, there can be no challenge for the Hundred. Rolls tir. Tryal 636.

At what time the Challenge must be.

Who shall be a sufficient Hundredor, See Williams his reading aforesaid.

If he dwell or have Assers, within the Leet, Rape, Franchise, or Vill, where the Venue is, he is a sufficient Hundredor.

If he hath Assers, in Kent, Common, of any

Tryals per pais.

any Court Market, Fair, Biscary, Toll passage, Leet, Office of Bayliwick, &c. he is a sufficient Hundredor; otherwise of an advowson, &c.

Challenges
propter affectum

3. Propter affectum: & this is of two sorts, either working a principal challenge, or to the favour. And again a principal challenge is of two sorts, either by Judgement of Law, without any Act of his, or by Judgement of Law upon his own Act.

Principal
Challenge.

Kindred.

And it is said that a principal challenge is, when there is express favour, or express malice. First, without any Act of his, as if the Juror be of blood or kindred to either party, Consanguineus, which is compounded ex Con & sanguine, quasi eodem sanguine natus, as it were issued from the same blood; and this is a principal challenge, for that the Law presumeth that one kinsman doth favour another, before a stranger, and how far remote soever he is of kindred, yet the challenge is good. And if the Plaintiff challenge a Juror for kindred to the Defendant, it is no Counterplea, to say that he is of kindred also to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias, forbid the Juror to be of kindred to either party.

Bodies Politick.

If a body politick or incorporate, sole or aggregate of many, bring any action that concerns

concerns their body politicke or incorporeate, if the Juror be of kindred to any that is of that body (although the body politicke or incorporeate can have no kindred, yet) for that those bodies consist of natural persons, it is a principal challenge. A Bastard cannot be of kindred to any, and therefore it can be no principal challenge. And here it is to be known, that Affinitas, Affinity Affinity, hath in Law two senses. In its proper sense it is taken for that nearness that is gotten by marriage, Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis. In a larger sense Affinitas is taken also for Consanguinity and kindred, as in the Writ of Venire facias, and other where. Affinity, or Alliance by Marriage, is a principal challenge, and equivalent for Consanguinity, when it is between either of the parties, as if the Plaintiff or Defendant marry the Daughter, or Cousin of the Juror, or the Juror marry the Daughter or Cousin of the Plaintiff or Defendant, and the same continues, or issue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal challenge, but to the favour, because it is not between the parties. Much more may be said hereof, sed summa sequor fastigia rerum.

As if he hath formerly tryed the cause, although reversed by Error, or upon the same title; Peremptory
Challenge
upon Record.

title; if the Record be not shewed, this challenge is not peremptory. For he that grounds a challenge upon a Record, &c. ought to have the Record ready. 33 H. 6. 55. The Record ought to be exemplified. 21 E. 4. 74.

'Tis a good challenge to say the Juror was attainted in an Attaint, or Writ of Conspiracy, but attainder in a Writ of Forgery of false Deeds, upon the Statute 1 H. 5. 3. but 'tis upon 5 Eliz. 14. is not, because this Attainder is giben of late time by the Statute 33 H. 6. 55.

In a Writ of Conspiracy 'tis a principal challenge, that the Juror was one of the Indictors, and although the Tryal is now of the Conspiracy, and not upon the first point, viz. the Felony.

In Trespas if one justifie as Master, and the other as Servant; 'tis not a principal challenge to say the Juror passed in the first issue for the Master, but he ought to conclude, & issue favourable. 18 E. 4. 12.

If two plead not guilty, and first one issue is tryed and then the other is tryed; 'tis no challenge to say the Juror tryed the other issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Attaint, for perhaps the Defendant will be found not guilty. That

That the Juror is within the distress of any of the parties, is a good cause of challenge. And so it is, if he be within the distress of any person concerned, although no party to the action. As within the distress of A. the Master of the Defendant who justifies as servant to A. by reason of his Freehold; and the issue is sur le franktenement. So for him in reversion received, within the distress of the Tenant for life. And so in an Action by the Tenant for life, within the distress of him in reversion: these are good challenges.

Deinsdistress.

So in an Action by Dean and Chapter, within the distress of the Chapter, or one of the Chapter, are good challenges.

Consanguinity of the half blood is a principal challenge: If the Juror be at the ninth degree, if it can be shewed it is good.

Principal for Consanguinity.

In an Action by the Dean and Chapter, or Major and Commonalty, Brother to one of the Commonalty, or to one of the Commons, is a good challenge: So to any person concerned in interest, although no party to the action. As Cousin to the Patron, of the Parson &c. so in Attaint to one of the petit Jury.

But in an Ejectment, and Not Guilty
 £ pleaded;

pleaded; 'tis no challenge to the Array that the Sheriff is Cousin to the Lessor of the Plaintiff: For it doth not appear that the Title of him in Reversion shall be in question, and he in Reversion is no party to the action. See it so adjudged upon Demurrer, Rolls iii. Tryal 653. But now in our feigned Ejectments it is otherwise, because the Title of the Lessor is only in question.

Principal for
Affinity.

'Tis a good challenge that the Juror is Cousin to the Plaintiff, & sic e converso; and so although the son be dead, for the spiritual affinity remains, and so is Curator of the Juror. That the Juror hath married the Sister of the party. That the Daughter of the Uncle of the Juror hath married the Uncle of the party. Cousin to the Wife of the party. These are good challenges although the Wife, &c. is dead; if her issue be alive; otherwise if she be dead without issue, for then the cause of the labour is determined.

But 'tis no challenge to say, the Juror is Brother to one who married the Sister of the party; nor that the Son of the party married the Sister of the Juror: because these are not parties to the action.

In Attaine 'tis a good challenge to the Juror, that he hath married the Sister of the Wife of one of the petit Jury, for the Alliance.

If a Juror declare the right of one party, Principal for
 or gibe his Verdict before hand, or take mo- favour.
 ney, this is a principal challenge: But if
 he promise a party, this is not a principal
 challenge, but for favour.

If the Action depending betwixt the par- Principal for
 ty and Juror, be such as implyeth malice, malice.
 this is a good challenge: but not if it imply
 no malice.

That the party hath an Appeal depending
 against the Juror, or the Juror against him,
 or Action of Battery. That they are in de-
 bate and wrangling, &c. are good challen-
 ges. Not actions of Debt, or Trespass,
 Quare clausum fregit, &c. Nor that the bro-
 ther, &c. of the party, hath actions against
 the Juror.

That the Juror was born out of the Kings Peremptory.
 Allegiance; for although he came into Eng-
 land an Infant, and is sworn to the King,
 yet he continues an Alien; and that he is Alien.
 outlawed, for then he is not legalis homo,
 are good challenges.

If the Juror says that he will pass for one For favour.
 party, because he knows the verity of the
 matter, this is no challenge: But if he says
 'tis for favour, 'tis a good challenge, if the
 Tryors find he spoke for favour, and not for
 truth.

King.

In an action betwixt the King and a party, the Subject cannot take any challenge for favour, as in an Indictment of Barratry &c. the Defendant cannot challenge a Juror for favour to the King.

How Challenges shall be taken of a Record.

If the Record be in the same Court, it need not be shewn, but if it be in another Court, it ought to be shewed; or else 'tis no principal challenge.

At what time they may be taken.

After the Array is affirmed, there shall not be such challenge to a Juror which would have been a sufficient challenge to the Array. As 'tis not a good challenge that the Juror was impannelled at the denomination of a party, for this had been a good challenge to the Array.

If a man challenge a Juror for non-sufficiency of Freehold, and this is adjudged against him, yet he may challenge for favour. And this shall be tryed, 10 H. 6. 18.

If the Jury upon finding of the principal do not tax the Damages, for which a Venire facias issues to the same Jurors to tax the damages, the parties cannot take any challenge for a cause before the first Tryal. But for a cause arising after they may. And so against les primer Jurors.

The

The King cannot challenge a Juroꝛ after King.
he is swoꝛn, unless it be foꝛ a Cause arising
after he is swoꝛn.

If the Defendant challenge the array In what cases
which is found against him, or he release he which
the challenge and the array is affirmed, challenges
and afterwards he challenge a Juroꝛ; he ought to shew
ought to shew the cause presently. the cause pre-
sently.

But if there be two Defendants, and one
challenge the array, and afterwards both
challenge a Juroꝛ; the other shall not shew
cause presently.

If any of the Juroꝛs be swoꝛn, and there
be not sufficient, foꝛ which a Tales is grant-
ed, and at the return one of the primer Ju-
roꝛs is challenged, the cause ought to be
shewed presently, he being swoꝛn before.

In an action between the King and a King.
common person, as in an Indictment of War-
terry, presentment of nuisance, &c. the De-
fendant if he challenges any Juroꝛ, must
shew the cause presently.

But in an Inquest betwixt the King and
a stranger, the stranger need not shew the
cause presently: Foꝛ in this case, the King
is as a common person of the Realm.

Cause

Cause ought to be shewed before the Tales be petused.

Treat. If both Parties challenge, although for several causes, as if one be for favour, and the other peremptory; yet the Juror shall be drawn without shewing cause.

In what In- It may be in an Inquest before the Sher-
quest a Chal-riff to enquire of waste, both to the Array
lenge may be. and Polls.

But not in an Inquest of Office, as in a writ of inquiry of damages.

In a writ of Right a challenge may be to the Polls del 4 Chivalers return.

Not of Coinage to the witnesses coming to try the deed in an Assise.

Tryal and
Tryors of
Challenges.

If one party challenge the Array which is affirmed, and afterwards challenge a Juror; he ought to shew cause presently, and this shall be tryed presently; but otherwise of the other, who did not take the Challenge to the Array.

The challenge of him who first challenged, shall be first tryed: Although the first be for favour, and that of the others be riens deins H.

If the Venue be of two Counties; and both Pannels challenged, the Esliors shall be one of one pannel and the other of the other.

If the array be challenged, the Court to try the array may chuse two Tryors, according to their discretion. 20 Aff. 15. 19 H. 6. 9.

If an action be depending between the Juror and one of the parties, and for this he is challenged, and the other says that this is brought by Covin; the Tryors may try this: for although the action is of record, yet the Covin is not.

What challenge they may try.

The Juror may be examined upon a voier dire, to any challenge that is not to his dishonour; but the Tryors are not bound by his Oath.

Evidence.

The tryors after they are sworn may go at large by assent of the parties until another day.

In trespasss against two who plead to issue, and a Venire facias is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessory, for one shall not disinherit the other.

In what cases a challenge or affirmance by one shall serve for others,

But

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received to say that this is by Covin, but the Juror shall be drawn in favour to the life of man.

And yet in a *Præcipe quod reddat* by two, and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the challenge, the other may say that this is not so, and have it tryed. Rolls in. Tryal 662. &c.

Levy gager.

In Gager de levy none shall be challenged for favour or insufficiency &c.

Cosinage.

If there be a challenge for Cosinage, he that taketh the challenge must shew how the Juror is Cousin. But yet if the Cosinage, that is, the effect and substance be found, it sufficeth; for the Law preferreth that which is material, before that which is formal.

Depending on
the same Title.
etc.

If the Juror have part of the Land that dependeth upon the same Title.

Distress.

If a Juror be within the Hundred, Leet, or any way within the Seigniorie, immediately or mediately, or any other distress of either party, this is a principal challenge.

But

But if either party be within the distress of the Juror, this is no principal challenge, but to the favour.

If a Witness named in the Deed be returned of the Jury, it is a good cause of challenge of him. So if one within age of one and twenty be returned, it is a good cause of challenge. Witness.
Infant.

Upon his own Act, as if the Juror hath given a Verdict before, for the same cause, albeit it be reversed by Writ of Error, or if after Verdict, Judgment were arrested. So if he hath given a former Verdict upon the same Title or matter, though between other persons. But it is to be observed, that I may speak once for all, that in this or other like Cases, he that taketh the challenge must shew the Record, if he will have it take place as a principal challenge, otherwise he must conclude to the favour, unless it be a Record of the same Court, and then he must shew the day and term. Challenges arising from the Jurors own Act.
Former Verdict.

So likewise one may be challenged, that he was Indictor of the Plaintiff or Defendant, either of Treason, Felony, Disprison, Trespass, or the like in the same cause. Indictment.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or e converso, this is allowed to be a good challenge in our books.

Arbitrator.

If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same cause and have been informed of, or treated of the matter, this is a principal challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a Commissioner chosen by one of the parties, for examination of Witnesses in the same cause, is no principal cause of challenge; for he is made by the King under the great Seal, and not by the party as the Arbitrator is, but he may upon cause be challenged for favour.

Commissioner.

Arbitrator in another matter is no cause of challenge.

Counsel.

If he be of counsel, Servant, or of Robes, or Fee, or of either party, it is a principal challenge.

Eat or drink at the parties charge.

If any after he be returned, do eat and drink at the charge of either party, it is a principal cause of Challenge, otherwise it is of a Tryal after he be sworn.

Actions of malice.

Action brought either by the Juror against either of the parties, or by either of the parties against him, which may imply malice or displeasure, are causes of principal challenge, unless they be brought by Covin, either

ther before or after the return; for if Covin be found, then it is no cause of challenge; other Actions which do not imply malice or displeasure, are but to the favour, as an action of debt, &c. More 3.

In a cause where the Parson of a Parish is party, and the right of the Church cometh in debate, a Parishioner is a principal challenge. Parson and Parishes. Otherwise it is in debt, or any other Action where the right of the Church cometh not in question.

If either party labour the Juror, and give him any thing to give his Verdict, this is a principal challenge. To labour the Jury. But if either party labour the Juror to appear, and to do his Conscience, this is no challenge at all, but lawful for him to do it.

That the Juror is a Fellow Servant with either party, is no principal challenge but to the favour. Fellow Servant.

Neither of the parties can take that challenge to the Polls, which he might have had to the Array. To the Polls.

Note, if the Defendant may have a principal cause of challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, alledge the same, and pray Process to the Coroners, Venire facias to the Coroners. which

which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a Venire facias to the Sheriff, and the Defendant shall never take any challenge for that cause, and so in like cases. But on the part of the Defendant, any such matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that cause, and can be at no prejudice.

Challenges to
the favour.

Challenge concluding to the favour, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the Tryors, upon hearing their evidence to find him favourable or not favourable. But yet some of them come nearer to a principal challenge than other: As if the Juror be of kindred, or under the distress of him in the reversion or remainder, or in whose right the Abowry or Justification is made, or the like: These be in principal challenges, because he in Reversion, remainder, or in whose right the Abowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by aid, Receipt, or Voucher, and yet the cause of favour is apparent; so it is of all principal causes, if they were party to the Record. Now the causes of favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading

Favour.

reading of in our books concerning that matter. For all which the rule of Law is, that he must stand indifferent as he stands sworn.

The Subject may challenge the Wolls, King. where the King is party. And if a man be outlawed of Treason or Felony, at the Suit of the King, and the party for avoiding thereof alledgeth imprisonment, or the like, at the time of the Outlawry, though the issue be joyned upon a collateral point, yet shall the party have such challenges, as if he had been arraigned upon the crime it self, for this by a mean concerneth his life also.

Propter delictum, As if the Juror be attainted or convicted of Treason, or Felony, or for any offence to life or member, or in attainr for a false Verdict, or for perjury as a Witness, or in a conspiracy at the Suit of the King, or in any Suit (either for the King, or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded, or to be stigmatised, or to have any other corporal punishment whereby he becometh infamous, (for it is a maxime in Law, Repellitur à sacramento infamis) these and the like are principal causes of challenge. So it is if a man be outlawed in Trespass, Debt, or any other action, for he is Exlex, and therefore is not legalis homo.

Challenges
propter delictum.
Infamous.
Outlawed.

homo. And old Books have said, that if he be excommunicated, he could not be of a Jury.

Bastard.

A Bastard may be of a Jury, yet may be challenged if he be of kindred, Jenk. Cent. 1. Cap. 90.

Who ought to be on Juries.

See the Statutes of W. 2. and Artic. supra chartas, what persons the Sheriff ought to return on Juries. And see F. N. B. breve de non ponendis in Affisis & juratis; and the Register in the same Writ. And see there what remedy the party hath that is returned against Law.

At what time Challenges must be taken.

It is necessary to be known, the time when the challenge is to be taken. First, he that hath divers challenges, must take them all at once, and the Law so requireth, indifferent Tryals, and divers challenges are not accounted double. Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. Thirdly, after challenge to the Array, and Tryal duly returned, if the same party take a challenge to the Verdicts, he must shew cause presently. Fourthly, so if a Juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. Fifthly, when the King is party, or in an appeal of Felony, the De-
fen-

sendant that challengeth for cause, must shew his cause presently. Sixthly, If a man in case of Treason or Felony, challenge for cause, and he be tryed indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the Hundred must be taken before so many be sworn, as will serve for Hundredors, or else he loseth the advantage thereof. Hundredors.

In a Writ of Right, the grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any challenge be taken unto them. Writ of Right

Nota. The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tryed; but if the Plaintiff challenge the Array of the principal, the Defendant may challenge the array of the Tales. After one hath taken challenge to the Poll, he cannot challenge the array. The Array of the Tales.

Now it is to be seen how challenge to the array of the principal Pannel, or of the Tales, or of the Polls shall be tryed, and who shall be Tryors of the same, and to whom Process shall be awarded.

If the Plaintiff alledge a cause of challenge against the Sheriff, the Process shall be directed

Coroners.

Elisors.

rected to the Coroners; if any cause against any of the Coroners, Writs shall be awarded to the rest; if against all of them, then the Court shall appoint certain Elisors, or Essors (so named ab eligendo) because they are named by the Court, against whose return, no challenge shall be taken to the array, because they were appointed by the Court, but he may have his challenge to the Polls. Note, if Writs be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet Writs shall never be awarded to him: for the entry is, Ita quod Vicecomes senon intromittat. But otherwise it is, for that he was Tenant to either party, or the like.

Array.

Two Tryors.

If the array be challenged in Court, it shall be tried by two of them that be intpannelled to be appointed by the Court: for the tryors in that case shall not exceed the number of two, unless it be by consent. But when the Court names two for some special cause alledged by either party, the Court may name others; if the array be quashed, then Writs shall be awarded, ut supra. If there be a demurr to a challenge, the Judge before whom the cause is to be tried, may determine it, or adjourn it to be heard another time. Stiles 464. Vide Bulstr. 1. part. 114.

Demurr to a
Challenge,
how deter-
minable.

If a Pannel upon a Venire facias be returned, and a Tales, and the array of the principal is challenged, the Tryors, which try and quash the array, shall not try the array of the Tales; for now it is, as if there had been no appearance of the principal Pannel; but if the tryors affirm the array of the principal, then they shall try the array of the Tales. If the Plaintiff challenge the array of the principal, & the Defendant the array of the Tales, there the one of the principal & the other of the Tales shall try both arrays. For other matter concerning the Tales, see in Cooks Reports matters worthy of observation. When any challenge is made to the Jolls, two Tryors shall be appointed by the Court; and if they try one indifferent, and he be sworn, then he and the two Tryors shall try another: and if another be tryed indifferent, and he be sworn, then the two Tryors cease, and the two that be sworn on the Jury shall try the rest.

Array of the
Principal and
Tales:

Two Tryors.

If any of the Jury, after some of them be sworn, be challenged, those that are sworn are to say, whether he that is challenged be indifferent or not. But if the first or second man be challenged, then the Court doth use to appoint some of them, (who it pleaseth), that shall be afterwards sworn to try the indifferency of the person challenged.

Tryals of
challenges.

Rules con-
cerning
Challenges.

1. All challenges must be taken before the Jurors are sworn.

2. If one challenge a Juror, and it be found against the challenger, he may not challenge the Juror for a second cause.

3. If one challenge the array and it be found against him, he may not afterward challenge any of the Polls, without shewing cause presently, and this shall be tried presently.

4. No challenge shall be admitted against the Tryers, appointed by the Court.

Tryal of
Challenges.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Tryal is to be had by two Counties, the manner of the tryal is worthy of observation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the grand Assise, and try the challenges of the parties. If the cause of challenges touch the dishonour, or discredit of the Juror, he shall not be examined upon his Oath; but in other cases he shall be examined upon his Oath, to inform the

Juror exa-
mined.

the tryals. If an Inquest be awarded by default, the Defendant hath lost his challenge; but the Plaintiff may challenge for just cause, and that shall be examined and tried.

Wheresoever the Plaintiff is to recover per visum juratorum, there ought to be six of the Jury that have had the view, or known the Land in question so as he be able to put the Plaintiff in possession, if he recover.

In Proprietary probanda, and a writ to inquire for waste, the parties have been received to take their challenges. But passing over many things touching this matter, I will conclude with the saying of Bracton, Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt, sufficient exempli causa. 1 Inst. 157, 158.

Treat doth signifie as taken out or withdrawn, and is applied to a Juror, that is withdrawn by consent, or removed and discharged by challenge.

A Juror sick was withdrawn, and another sworn. Palmers Reports 411.

If the Defendant do not appear at the tryal when he is called, he loseth his challenge.

to the Jurors although he doth afterwards appear.

A wrong
name.

'Tis a good challenge to a Juror to say he is returned by another name in the Panel.

No Freehold.

A Juror appeared and said he had no Freehold, and prayed that he might not serve, yet the Judge would not spare him; for he may have an action against the Sheriff for returning him. Rolls 2 part. Reports 483.

CAP. The Challenge pro defect Hundred, must be written in Parchment, and the Council must arraign it in French, upon which the Defendant may take issue or demur. The Clerk or Associate in Court must call the Jury over, and ask if they have any Lands within the Hundred, or had at the time of the Array of the Pannel, and whether they dwell, or did dwell, in the same. And upon examination if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the side of every of their names thus [præter Hundred] but if he find there be two Hundredors, he is to resort back to the præter Hundred, and swear them in order. So that you see the Tryal whether Hundredors or not, is determined by the Courts examination by the Poll severally. But if the Council demur, and the other side joyn in demurrer, the Judge of Assises may affirm the Challenge; and over-rule the Demurrer, or allow the Demurrer good, and proceed to the Tryal of the Cause; or if the Judge doubt, it may be determined in Bank, but this is great delay. If the challenge be adjudged good, the Court awards, Que le pannel il soit casse.

At Common Law there ought to have been 4 Hundredors returned and appeared in all actions pro meliori noticia causæ in controversia, for vicini vicinorum facta scire præsumitur.

In Cities, Corporations, Burroughs, and Towns, and Counties, this Challenge cannot be.

utr. But by the Statute 35 H. 8. ca. 6. fir are to be returned and appear. But since by the Statute 27 Eliz. ca. 6. if two Hundredors be returned and appear, it is sufficient in all personal actions: But in real actions there must be fir, or else Remaner pro defectu Jur.

The Court shall appoint two Tryors in a challenge to the Doll, and if they find two indifferent the first Tryors shall be discharged, and the two that are found indifferent, being sworn to try the Issue, shall also be sworn to try the rest of their fellowes.

At Common Law there used to be returned 24 upon the Venire, and afterwards a Habeas corpora with a Duces Tales, and if a full Jury did not appear or were challenged, then a Distringas with an Ocho Tales, and so to the Duo Tales, if there was not a full Jury. And this was the course until the Statute 35 H. 8. which gives the Tales de circumstantibus at the Assises, &c. and by the Stat. 5 Phil. & Marie ca. 7. where the King, Queen, or Informer, &c. are parties.

A Challenge may be taken to those of the Tales de circumstantibus.

By the Statute 33 Ed. 1. The King and those who prosecute for him, must shew their cause of Challenge, as betwixt party and party.

Tales de circumstantibus
may be in the
case of Aliens.

party, and left to the discretion of the Justices.

The King or any one authorised for him may release his challenge. Where the party may challenge, the King may challenge.

'Tis no challenge to say, the Juror is the Kings Tenant, or that he is favourable to the King, but 'tis good to say, the Sheriff or Juror bears grudge or malice to the Defendant where the King is party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a year: For the Statute which enjoyns that, speaks only between party and party.

The first who challenges be he Plaintiff or Defendant, shall have the preference and advantage of his challenge. If a Juror be once challenged and withdrawn upon the principal; he cannot serve upon the Tales, if he doth 'tis Error, and Judgment may be stayed. And so if he be challenged, and a Jury remains pro defect. Juratorum, if he be sworn upon a new Distringas, 'tis Error, not helped by any Statute of Jeofails, and a mistrial and a Venire facias de novo may be awarded. Cro. Eliz. fol. 429. Whirbys Case.

Elisors may be sworn in some cases to return and impanel all Juries, as should upon

upon any Venire facias, Habeas Corpora or Distringas Jur. come to their hands impartially, indifferently and without favour or affection, or at the denomination of any person.

The Record of Attainder, Conviction, Excommunication Outlawry, &c. or a Copy thereof ought to be produced, to prove the cause of challenge thereupon.

Where bodies politic or Corporate are concerned, a challenge may be taken which arises from the individuals, as Brother to one of the Prebendaries, is a good challenge where the Dean and Chapter are parties; &c. Hob. 87. so a Parishioner, where the right of the Church comes in question at the Suit of the Parson. 17. Aff. 15.

In High Treason, the prisoner may peremptorily challenge to the number of 35. which is under the number of 3 Juries but in Petite Treason, murder or Felony the number is reduced to 20. The prisoner may challenge any that are Witnesses against him.

Where the King is party the Defendant must shew the cause of his challenge instantly.

After a challenge for cause, the prisoner may challenge the same person peremptorily.

C A P. X.

Of what things a Jury may inquire ;
when of spiritual ; when of things
done in another County, or in an-
other Kingdom ; when of Estop-
ples, and when not ; when of a mans
intent, &c.

The next words in the Writ, which
have not yet been taken notice of, are
these, *per quos rei veritas melius sciri poterit* ;
and this is the chief end of their meeting to-
gether : No Court can give a right Judge-
ment, unless the truth of the fact be cer-
tainly known ; and to find out this truth,
no way is like to this of Juries : for they do
not only go upon their own knowledge,
though they are Neighbours to the
place where the question is moved, and
so are presumed to have a better know-
ledge of the fact, than any others ; For
vicinus facta vicini præsumitur scire ; But
lest this presumption should fail, the Law
allows other Evidence to be given to them,
by

See more of
this matter,
cap. 13.

Ex facto Jus
oritur.

by which they may more certainly and confidently give their Verdict of the issue, which is meant by this word *Rei*.

And here, it will not be amiss to give you a brief description, *de quibus rebus*, what the Inquest may inquire of, and find.

Of the Law.

Wherefore, though it be true, that a Jury shall not be charged, nor meddle with a matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily experience (as well as Littleton, Sect. 368.) tells us, that they may take upon them the knowledge of the Law, and give a general Verdict; though to find the special matter is the safest way for them, because, if they mistake the Law, they run into the danger of an Attainr.

In the Case of Manby and Scott, *adj. Trin. 13. Car. 2. B. R.* one question was if the Verdict was well found, in an action of the case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were necessaries, and according to her degree, whereas (as was objected) they ought to have found the degree of the party, and the value of the Wares and left it to the Court to judge.

But it was answered and resolved that the Court. *i. e.* the Judge before whom
tis

'tis tryed informs the Jury of the matter of Law, and accordingly they find, and so it belongs not to this Court.

Broughton a Reader of the Temple brought a Bill by Quo minus in the Chexquer against Prince for maintaining a suit against the Stat. &c. Prince pleads that he was admitted in the Inner Temple, and student for many years there, that he was Consiliarius, in Lege eruditus, and took his fee in that cause. B. replied, de Injuriâ suâ propriâ absque hoc quod in lege eruditus, &c. & hoc petit &c. & deus defendit similiter.

It was moved that the Defendant should demurr to the Replication. Atkinson, excepted to the Traverse and Conclusion; for it can't be tryed by a Jury; for (says he) if matter in Law be to be tryed by the Judges, a fortiori, the learning of the Law ought to be tryed by them.

Per Manwood Ch. Baron, It shall be tryed by the Country. 3 Leo. 237: Broughton vers. Prince; which case is cited 3 Cro. 728. to be otherwise ruled, yet, it was allowed there a good issue, whether a Parson of a Parish could speak Welch.

Hut. 20, 21. Whether a plaint was le-
bied according to the Custom, was tryed by
a Jury, who are directed by the Court, as
to

to the plaint, and whether it were pursuant to the Custom, and are to find according to such directions.

Of a mans
intent.

In many cases, the Jury are to inquire of the knowledge and intent of a man, as where the Nar. is, that the Defendant kept a Dog which killed the Plaintiffs Sheep, *Sciens canem suum ad mordendos oves consuetum*; though *Sciens* be not traversable, yet the Jury upon Evidence must inquire of it. lib. 4. 18.

Of spiritual
things.

In some cases, a Jury may try and find a spiritual thing, as a Divorce, Patrimony, &c. and must take notice thereof, upon pain of Attaint. li. 4. 29. lib. 9. lib. 7. 43. vide hic cap. 2.

In Trespas *Quare Clausum fregit*, in the County of D. where the Trespas was committed in the County of S. upon Not guilty, if the Jury find the Defendant guilty in the County of S. their Verdict is void. But if they find him Guilty generally, an Attaint lyeth. *Finch.* 460. Because this Trespas is local; and what is local cannot be inquired of by men of another County, for they can have no consens of it.

The Jurors of one County, may find any transitory thing done in another County: Nay some times they must find local things in another County; as if the Heir pleads *riens per discent*, and the Plaintiff replies, Assets in a Parish and Ward within London, the Jury may find Assets in any County; in the same case against an Executor,

who pleads *plene administravit*, the Jury may likewise find Assets in any part of the world. And the Reason is, because the place is only named

named for necessity of tryal. But where the place is part of the issue, it is otherwise. And therefore if I promise in one place to do a thing in another, and issue is upon the breach, the Jury ought to come from the place of the breach. But if I promise in London, to do a thing at Burdeaux in France, and issue upon the breach, yet this shall be tryed in London for necessity, because otherwise it would want tryal, the Jury must inquire of the breach at Burdeaux. But if I promise in France, to do a thing in France, so that both Contract and performance is beyond Sea, this wants tryal in our Law.

Of things done in another County or Country.

Vide cap. 8.

Rolls tit. Try. al fol. 571. 624.

In the Case of Drake and Beere. Trin. 15 Car. 2. B. R. this difference was agreed by the Court, viz. That a Jury in an Inferiour Court may inquire of things out of the Jurisdiction, if they be but for increase of Damages, as is 1 Cro. 571. Ireland vers. Blackwell, but if they inquire of any thing issuable out of that Jurisdiction, it is nought, 1 Cro. 101. 2 Cro. 503.

Error was brought to reverse a Judgement given in the Palace Court, in Indebitar. for that the Defendant was indebted to the Plaintiff Infra Jurisdictionem for Pursuing of a Child, not saying the Pursuing was Infra Jurisdictionem.

Wadh. Windam Just. held it good, for that it is a debt every where, and not like a debt that ariseth by matter collateral: But Twisden Just. doubted. Whitehead vers. Browne. Pasch. 15 Car. 2. B. R.

Estoppels.

When the Estoppel is found, the Court may judge according to the especial matter.

The Jury may find Estoppels, as the taking of a Lease of a man's own Land, by Deed indented; or the delivery of a Deed before the date, as in Debt by an Administrator upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded, that the Intestate dyed before the date of the Obligation, and isint nient son fait, upon which they were at Issue, and adsjudged that the Jury might find that the Bond was delivered the 3d of April, because they are sworn ad veritatem dicendum; though the parties are estopped to plead a Deed was delivered before the date; but they may plead a delivery after the date, because it shall never be intended, that a Deed was delivered before the date, but after it may.

Estoppels.

But if the Estoppel, or admittance be within the same Record, in which Issue is joyned, then the Jurors cannot find any thing contrary to this, which the parties have affirmed, and admitted of Record, though it be not true: For the Court may give judgment upon matters confessed by the parties; and the Jurors are not to be charged with any such thing, but only with such in which the

the parties vary. li. 2. 4. li. 4. 53. Co. Lit. 227.

A Decree in Chancery shall be tryed by a Jury, and not by it self; for it is not a Record, but a Decree Recorded. The Chancery, as it is a Court of Equity is not a Court of Record: But touching things agitated in the Petty Bag Office, it is a Court of Record. Decree.

The Jury may find Deeds, or matter of Record, if they will, though not shewed in Evidence. Finch 400. They may inquire of things done before the memory of man. lib. 9. 34. Records not shewed.

Null tiel Record is not to be tryed by a Jury, but upon the general issue, &c. they may find a Record.

The Jury may find a Warranty, being giben in Evidence, though it be not pleaded: Nay, the Jury may find that, which cannot be pleaded, as in Trespass, upon not guilty; The Jury may find that the Defendant leased Lands for life, upon Condition, and entred for the Condition broken; Tho' this cannot be pleaded without Deed, yet the Jury may find it. Lit. Sect. 366. Warranty. Condition.

Where a Collateral Warranty binds, this may well be giben in Evidence: For al-
A a 2 though

though it doth not give a right, yet in Law
this shall bar and bind a Right. Lib. 10:
97.

But this matter comes more properly un-
der the Title Evidence; wherefore we will
proceed to that.

See also in Chap. 13.

C A P.

C A P. XI.

Evidence and Witnesses.

Evidence, Evidentia: This word in legal understanding (saith Coke 1. Inst. 283.) doth not only contain matters of Record, as Letters Patents, Fines, Recoveries; Inrollments, and the like, and writings under Seal, as Charters and Deeds, and other writings without Seal, as Court-Rolls, Accounts, and the like, which are called Evidences, Instruments. But in a larger sense, it containeth also Testimonia, the Testimony of Witnesses, and other proofs, to be produced and given to a Jury for the finding of any Issue, joyned between the parties: And it is called Evidence, because thereby the point in Issue is to be made evident to the Jury: Probationes debent esse evidentes (id est) perspicue & facile intelligitur.

And this Evidence (with Bracton) we may term probatio duplex, viz. viva, as Witnesses,

Presumption.

Witnesses, viva voce; and Mortua, as by Deeds, Writings, and Instruments; and violenta præsumptio, in many cases, is plena probatio, and therefore if all the Witnesses to a Deed be dead, then the Deed shall receive Credit; per collationem sigillorum scripturæ, &c. but especially if there hath been a continual and quiet possession; which is a violent presumption. 1 Inst. 6. for no man can keep his Witnesses alive.

Proof.

If a thing be generally referred to proof this shall be intended proof by Jury; but if other manner of proof be agreed upon, that shall take away the proof which the Law generally intends by Jury: Hob. 127. As if I promise to pay what money you prove B. borrowed; this may be proved in the same action brought upon the promise. Vide Rolls tit. tryal 594, 595.

Witnesses.

Men that are so branded with Infamy, that they cannot be Jurors, for which see before, who may be Jurors, cannot be Witnesses; yet per Glyn Ch. Just. and Newdigate Just. Mich. 1657. B. R. Conviction of common Barreny hinders not from being a witness, but Maynard, Sergeant, held strongly against it.

At Lent Assises, Suff. 1657. St. John Ch. Just. C. B. would not allow one who had been whipped for petty Larceny, to be a Witness;

ness; but Earl Sergeant said, they ought to be Stigmatici that are disabled from being Witnesses: Yet per Roll. Ch. Just. one burned in the hand for Felony, may be a Witness; for he is in capacity to purchase Lands, and his fault is purged by his punishment. Stiles 388.

The Wife cannot be a Witness for, or against her Husband, 1 Inst. 6. that is in case of a common person between party and party, but between the King and the party, on an Indictment she may, although it concerns the Feme her self, as in the Lord Audley's Case, Hurr. 116. So she may have the Peace against her Husband. Who may be Witnesses.

And so it was resolved in John Browne's Case, Trin. 25 Car. 2. B. R. on the Stat. of 3 H. 7. cap. 2. vid. 1 Cro. 492.

The King cannot be a witness by his Letters under his Signet manual: One attainted of Piracy cannot be a witness to probe another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this confession shall be rejected, because he is attainted. A woman cannot be a witness to probe a man to be a Villain. Co. Lit. 6.8.

Neither can the party to the usurious Contract, be a Witness against the Usurer, in
an

an Information upon the Statute of Usury.
 But Kindred never so near, Tenants, Ser-
 vants, Masters, Counsellors, and Attor-
 neys, &c. may be Witnesses. A Counsellor
 may be a Witness to the Agreement, &c. but
 not to validity of an assurance, nor to the
 Counsel he gave. March, Rep. 43. If a
 Witness being served with Process, and ha-
 ving money sufficient to bear his charges,
 (or less if he accept it) do not appear to give
 his testimony, he forfeits 10 l. to the party
 damaged, and must recompence his dama-
 ges. 5 Eliz. 9. If a Witness commit wil-
 ful perjury, he loseth 20 l. shall be imprison-
 ed 6. months without bail, stand in the Pil-
 lory, and be disabled to be a Witness, so shall
 the suborner, who procures the perjury. 5
 Eliz. 9.

A party robbed is allowed a good witness
 in his own action against the Hundred, for
 he is not bound, nay is to be blamed, to tell
 any one what charge he carries with him;
 and if he should not testify, the Law would
 be often fruitless for want of Evidence, or
 else more Robberies committed by the parties
 discovering his money.

In the Case of Brereton and Tatham, Mich.
 1656. B. R. Glyn. Ch. Just. Cited the Lord
 Chandoi's Case in this Court, where one
 Gares an Executor was produced to prove the
 Will as a witness, to which he (as Coun-
 sel)

fel) excepted, because of his Executorship. It was answered that he had fully administered: He replied, the Assets might afterwards come to his hand; but the Court resolved that it would not be presumed to bar his Testimony, which was allowed in the principal Case, being in e j Arcment.

It's no good exception to a Witness that he hath common per cause of Vicinage in the Lands in question, because its but an excuse of Trespass, and no interest. Clapham's case. Mich. 1657. B.R.

The same of common of Shacke.

If Obligee devises the debt to the Obligor, and his Executors deliver up the Bond in satisfaction of the Legacy which is cancell'd, and after the validity of the Will is question'd, viz. whether the Testator was compos, &c. the Obligor is a good witness for the will, because by the cancelling of the Bond his debt was discharged. But Contr. in case of a Mortgage, for though the deed be cancelled, if it be no good will, he must pay the money. Goodman vers. Turbervill. Mich. 1657. B. R.

An Action was brought by the Corporation of the Weavers of Norwich, for a penalty against a Weaver for working in his Trade in Harvest time, contrary to an Ordinance

nance by them made. And Atkins, Just. allowed one of the Corporation to be a witness, though one moiety of the penalty was due to the Corporation. Lent Assise 1657.

In a Tryal at Bar, where an Estate for Life is limited to I. S. remainder to the poor of the Parish of Greenwich by Will; the Inhabitants of Greenwich were allowed to be witnesses to prove the Will. Townsend and Roane Mich. 1658. B. R.

An Action of Debt was brought, Summer Ass. Suff. 1669. by the Town of Ipswich for 50 l. a Fine set on one chosen Common Council Man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town Clerk (though a Freeman) was allowed a witness to prove Election, Refusal, &c. and the Fine set, which is for necessity, for that none other are or ought to be present at those Acts. Rainsford Just.

Per Hale Ch. Just. Norf. Summer Ass. 1668. A Freeman of Lynn is not an allowable witness to prove the custom of Foreign bought and Foreign sold in that Town. Harwich vers. Twels.

As to Witnesses privileges :

One was sub-poena'd ad testificandum, and prayed a privilege from being arrested, which

which was granted, and per Cur. it will supersede an Arrest on mean process, but not upon an Execution; yet the Sheriff in that Case may be committed for his Contempt. Hen. Nevil's case Mich. 15 Car. 2. B. R.

Detaining of Witnesses:

Sir Jo. Jackson was Convict on an Information for preventing of Evidence to be given on an Indictment of Perjury against Fenwick and Holt, who had been witnesses for Sir J. J. he arrested some witnesses, and gave money to others, and so they were acquitted: He was fined 1000 Marks, 1 months imprisonment, behaviour for 12 months. Hill. 1663. B. R.

Proofs to determine matter of Fact, and Proofs, to be offered to a Judge and Jury, are of two sorts. First Living, as by Witnesses, and to a Jury one witness is sufficient. And Dead, as matters of Record, as Letters Patents, Fines, Recoveries, Incrollments, &c. Writings sealed and delivered; as Feoffments, Leases, Releases, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Case be between the King and a Prisoner, he is first to say what he can himself, and then all that can say any thing against him are to be heard upon Oath, and then others may be heard for him, but not upon Oath: And according

to this Evidence on both sides, or without any Evidence at all, the Jury are to give their Verdict, according to their knowledge and Oaths.

Such persons as are infamous, as are persons attainted of Felony, or of a false Verdict, or of a Conspiracy, or of Perjury, or of Forgery, upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. and such as have had Judgment, to lose their Ears, or stand on the Pillory or Tumbril, or have been stigmatized or branded, and Infidels, Men not of sound memory, or not of discretion, or such as are interested in the cause, or have benefit, are not competent witnesses. Co. 1. Inst. 6. but we see Jews are daily admitted witnesses.

*Plene Admini-
stravit.
Pedigree.*

An account given to and allowed by the Ordinary, is not good Evidence; nor a Pedigree by a Herald of Arms, to prove an Heir, but it must be proved by Deeds, Records, or Witnesses.

*Recogni-
sance:
Agreement.*

If the issue be a Recognizance or not, a Recognizance with a defeasance is good Evidence. Pl. 14. So of an Agreement, a special Agreement will prove it. Pl. 8.

*Tenure in Ca-
pit.*

A Licence to alien Land, or a pardon for alienation of Land, was held by a common presumption, to be a good proof that the Land was held in capite. A

A thing which is concluded in the Ecclesiastical Court, which doth concern Lands, is not to be given in Evidence; for the Courts of Common Law are not to be guided by their proceedings. Ecclesiastical proceedings.

Ancient Deeds may be given in Evidence, although the execution of them cannot be proved. Ancient Deeds.

He that takes out a Copy of part of a Record, must at least take out so much as concerns the matter in question, or else the Court will not permit it to be read. Copy of a Record.

If one produce a Lease made upon an Outlawry, in Evidence to a Jury to prove a Title, he must also produce the Outlawry it self. Outlawry.

To prove a Feoffment a Deed of Feoffment is shewed, but no Livery is indorsed, if possession has gone with the Deed, it is good Evidence. Feoffment. Rolls Reports 1. part 132.

Upon Not Guilty to an Information upon a penal Law. a Proviso to excuse him may be given in Evidence. Proviso. Jones Reports 320.

If a man prescribe in a non decimando generally, he cannot give a Bull in Evidence. Non decimando. Palmers Reports 38.

A Deed

Deed.

A Deed with the Seals torn off was admitted to declare uses. Palmers Reports 403, 405.

Records.

Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence, and so may any thing done in the Countie-Court, Court Baron, or Hundred-Court, &c. be proved by Witnesses.

Fine.

A Fine, or common Recovery, may be given in Evidence, though it be not under the great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usual Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence. Plow. 410. Siles 22.

Depositions.

Depositions in the Ecclesiastical Court cannot be given in Evidence, though parties be dead. March 120. A Defendants answer in an English Court, is good Evidence against him, but not against others. Godbolt, 326. Where the evidence proves the effect and substance of the issue, it is good. By order of Court the Depositions taken of a Sick Witness may be given in evidence.

Affets.

As upon plene administravit, if it be proved that the Executor hath goods of the Testator's

toys in his hands, he may give in Evidence, that he hath paid of his own money for the Testator, to the value of those goods. Co. Lit. 283. Dyer. 2.

So if a Lease be pleaded, a Lease upon Condition is good Evidence. 1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence. 44 E. 3. 39. A special agreement is evidence for an agreement. Plow. 8.

But if a Feoffment be pleaded in Fee, Feoffment. upon issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because it doth not answer the issue; and wheresoever Evidence is contrary to the issue, and doth not maintain it, the Evidence is not good. 11 H. 4. 3. Feoffments 41. agreement in reversion is no evidence but a Lease and Release is. 20 H. 7. 5. If the Indorment be of a Libery by Attorney, the Letter of Attorney must be shewed.

Upon an Assumpsit to the Husband, an Assumpsit. Assumpsit to the Wife, and his agreement, is good evidence. 27 H. 8. 29. upon non assumpsit to a special promise, payment is no evidence per 3 Judges.

Challenge.

In challenge to the array, because made at the denomination of the Sheriffs Clerk, evidence at his Bayliffs denomination, is good, because favourably made is the substance. 38 H. 6. 9.

Assets.

If the issue be in a Suit against an Executor, Administrator, or Heir, Assets in London; to prove Assets in another place, is sufficient. Li. 6. 47. Dyer 271.

Accompt.

Accompt pleaded before two; Accompt before one, is good Evidence. Hob. 55. because the accompt is the substance.

What Evidence upon the general issues.

Upon the general issue, the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cause of action, or which doth intitle the Defendant to the thing in question.

Detinue.

But if he hath cause of justification or excuse, it must be pleaded: wherefore upon non detiner, in detinue, the Defendant may give in Evidence a gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs goods; but he cannot give in Evidence that the goods were pawned to him for money, and that it is not paid, but he must plead it. 1 Inst. 283. For the property is in the pledger.

Upon Not guilty, in Battery, Son assault In Battery.
 demesne, is no Evidence; for thereby the
 Battery is confessed. Ib. neither is Not
 Guilty, good Evidence upon Son assault
 demesne:

Upon Not Guilty, in Trespas, Insuffic^{ie} Trespas.
 ency of the Plaintiffs mounds, or to justifie
 for a Kent Charge, Common, Licence,
 Son assault demesne, or the like, is no good
 Evidence. Ib. but to prove a Trespas before
 or after the day laid in the Declaration is
 good. 1 Inst. 283.

So upon the Plea, Nol Wast fait, in an Wast.
 Action of Wast, he may give in Evidence
 any thing that probeth it no Wast, as by
 Tempest, by Lightning, by Enemies,
 &c. But he cannot give in Evidence any
 justifiable Wast, as to repair the House, or
 the like; nor a reparation of the Wast, be-
 fore the action brought. Ib.

Upon non est factum, 'Tis no Evidence, to Non est factum.
 shew the Bond that was made upon an us-
 rious Contract, or that the Sheriffs name
 is mistaken, &c. in a Bail Bond; or that
 the Bond is joynt, or several, or delivered at
 another place; or that it is void by Statute.
 But it must be pleaded in abatement. Ib.
 Hob. 72.

But to prove that the Seal was broken off, and put on again; or to prove a Rasure of the Deed; delibered as an Escrow, &c. this is good Evidence. Li. 5. 119. 11. 27. If 'twere done befoze the action brought; but if the Seal was broke off, &c. by chance, after issue joyned, the Jury may find it specially.

To prove the Sealing and delivery of a Deed, and not know the party that did it, is not good evidence; but if he knows the party upon sight of him, it is good enough. Kelw. 59.

Trover.

Upon Not Guilty, in Trover and Conversion, a Demand, and denial of the Goods, is good Evidence. Plo. 14. li. 10. 57. Clo. 1 part. ult. pub. 495. Hob. 187.

Plene Administravit.

Upon plene Administravit, the Executor cannot give a Judgement in Evidence. Kelw. 59. nor payment of Debts by Contract, in Debt brought upon an Obligation. A Cup pawned and redeemed with the Executors own money, is good Evidence; but a recovery ought to be pleaded: upon nil debet, in Debt for Rent, That the Lessor entred into part of the Land, is no good Evidence. Goldf. 81. But non desinit, 1, 9 H. 7. 3.

Upon Not guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence. 19 H 8. 9. Parco fracto.

So upon Not Guilty, in Trespass, in the Warren. Plaintiffs Warren, Evidence that he hath no Warren, is good. 10 H. 6. 17. Kitchin. 119.

A Shop-book no evidence after a year. Shop-books. 7 Jac. cap. 12.

In Debt for Arrerages of an accompt upon Nil debet modo & forma; No accompt is good Evidence. 2 H. 6. 26. Upon Not guilty in Trespass, a Lease for years, 12 H. 8. 2. or that locus in quo, &c. is the Freehold of another, 4 E. 3. 45. is good Evidence; but upon this he cannot justify his entry upon the place by a Strangers Licence, or Command, Br. general issue 81. because this is a justification by way of excuse: Neither is a Lease at Will, good Evidence in this case. Accompt. Trespass.

So upon Not guilty, in Trespass for goods, 'tis good evidence that the goods were a Strangers. 9 H. 6. 11. But that they were a Strangers, and that he as Servant to the stranger, or by his commandment, took them from the Plaintiff, is not good, Br. general issue 81. because the Trespass.

pais is confessed. But that the stranger gave them to the Defendant is good. 9 H. 6. 11. In Trespals the Writals must be proved as they are laid.

Payment by
presumption.

If the Defendant plead payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any use paid for it many years, common presumption is good evidence, that the money is paid, and the Juries use to find for the Defendants, in such cases.

Trespals another day.

If the Trespals were in truth done the 4th. of May, and the Plainiff alledgeth the same to be done the 5th. of May, or the first of May, when no Trespals was done; yet if upon evidence, it falleth out that the Trespals was done before the Action brought, it sufficeth. 1 Inst. 283.

Deed.

'Tis dangerous to permit evidence to a Jury by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect, and void, which the Witnesses could not perceive; yet in cases of extremity, as where the Deed was burned, or lost by some

Some other notorious accident, the Judges may at their discretion, allow them to be proved by witnesses. li. 10. 92. and so of a Record.

In Case against an Executor ; whereas Executor, the Testator was indebted to the Plaintiff, the Executor promised to pay the debt, in consideration the Plaintiff would forbear to sue him; the Executor may give in evidence upon Non assumpsit, that there was no Debt, or that he had no Assets tempore promissionis, for then there would be no Consideration. li. 9. 94. William Banes Case, upon the issue neunques Executor to prove an Administration granted to him, is good evidence. Dyer. 305.

Evidence shall never be pleaded, but the Evidence: matter of fact shall be pleaded, and if it be denied, the evidence shall be given to the Jury, not to the Court. lib. 9. 9.

Evidence, that the Wife of every Copyholder, shall have the Land durante viduitate, will not maintain the issue, that the Custom of a Mannor is, that she shall have the Land during her life, after her Husbands death, because, though Estate for life, durante viduitate, imports an Estate for life, yet an Estate durante vita, is more large and beneficial. li. 4. 30.

Things done before the memory of man, What may be in another County, or in another King- given in Evidence.

dom, may be giben in Evidence to a Jury, as Assers in another County, &c. More 47. Ser li. 4. 22. 9. 27. 28. & 34. li. 6. 46, 47.

Payment.

Upon issue, payment at the day; payment before or after the day, is no Evidence. More 47. but upon Nil debet, it is good Evidence, because it proves the issue.

Covin.

Upon issue, Assers or no Assers, or seised, or not seised, if one gibe a Feoffment, &c. in Evidence, Covin may be giben in Evidence, by the other, but not if the issue be infeoffed, or not infeoffed, for it is a Feoffment. tiel quel, though made by Covin. li. 5. 60. Hob. 72.

Doomesday-book.

The Book of Doomesday brought in Court, is good Evidence to prove the Land, to be ancient Demesne. Hob. 188.

Attaint.

In Attaint, the Plaintiff shall not gibe more evidence, nor examine more Witnesses, than was before, but the Defendant may. Dyer 212.

Court-Rolls for Copy-holders.

Copies of the Court-Rolls, are the only evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) they are called Tenants by Copy of Court-Roll, because they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls.

Rolls. But Cook explains the Text, and says, This is to be understood of Evidences of Alienation; for a Release of a Right by Deed. A Cope-holder (that cometh in by way of admittance) may have, and that is sufficient to extinguish the Right of the Cope-holder which he that maketh the Release had.

In Actions upon the Case, Trespas, Battery, or false imprisonment against any Justice of Peace, Mayor, or Bayliff of City, or Town Corporate, Headborough, Portreeve, Constable, Tythingman, Collector of Subsidy or Fifteen, in any of his Majesties Courts at Westminster, or elsewhere, concerning any thing done by any of them, by reason of any of their Offices aforesaid, and all other in their aid or assistance, or by their Commandment, &c. They may plead the general issue, and give the special matter of their excuse, or Justification in Evidence. 7 Jac. cap. 5.

Special Evidence upon the general issue, by whom.

General acts of Parliament, may be given in Evidence, and need not be pleaded; and so may general Pardons given by Parliament, if they be without Exceptions; But commonly advantage of the Act is given by the Act it self to the offender, without pleading it, as by the late (most truly so called) general act of Indemnity, every person thereby pardoned, may plead the general issue. Statutes. Pardons.

general issue, and give the act in evidence, for his discharge, which are general, and which particular Statutes, see lib. 4. 76.

Trover.

Upon not guilty in Trover, the Defendant may give in Evidence, that the goods were pawned to him for 10 l. That he distrained them for Rent, or damage feasant, That as Sheriff, he levied them upon Execution, or that he took them, as Tythes severed. Cro. 1 part. 157. 3 part. 435. Hob. 187. A demand and denial of the goods is evidence of a confession.

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the Battery made the same day in the Declaration, and shall not be admitted to give another day in evidence, as the case may be. As in Battery, the Defendant pleaded, Son assault Demeſne, and the Plaintiff replied, *de injuria sua propria*, &c. he cannot give in Evidence a Trespass at another time; But he should have replied, that at another time, in the same day of his Count, the Defendant did the other Trespas, &c. to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespass at another time, but must conclude *Sans tiel cause*, &c. *vide Apres*.

the

the Defendant demurred, upon the difference aforesaid. Brownlow 1 part 233. 19 H. 6. 47. But upon not guilty, it is otherwise, though there be never so many Batteries between the parties. Littleton, Sect. 485.

Prohibition for suing for Tythes in Bocking Park in Essex, and surmised, that the Lands were parcel of the possessions of the Priory of Christs Church in Canterbury, and the said Prior and his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads, that the Prior and his Predecessors, did not hold them discharged, and upon issue joyned thereon, the evidence was that the Prior, or his Predecessors, time out of mind, &c. never paid Tythes; but no cause was shewn, either by unity of possession, real composition, or other cause to shew it discharged: *In nil debet,* Cook said it was no evidence; for it is a prescription in non decimando, Curia contra; For a spiritual man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged, as the Prior held it; and if he held it discharged, non refert, by what means; for it shall be intended by lawful means, and the Jury afterwards found for the Plaintiff. Cro. 3. part. 2. 6. *upon the Statute for tythes a Lay person cannot give a Non decimando in evidence, so may the King, and any other spiritual persons. li. 2 B. of Winchester's Case.*

*Indebitatus
assumpsit.*

Upon non assumpsit, in a general Indebitatus assumpsit, the Defendant may give in evidence, payment at any time, before the Action brought, but upon a special promise to pay money, &c. it is otherwise, *Causa patet*; for in the first case, if there be no Debt, the Law will infer no promise.

A Church-Book is no evidence.
Brownlow 1. part 207.
Postea 26. *Assumpsit*. pl. 4.

If a Church-book, or any thing else is given in evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the *Postea*. *Brownlow* 1 part. 207. But the Court may order a new Tryal, upon cause shewed, as for excessive damages, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

But here I recollect my self, and consider that this Chapter is of greatest use to our Circuit practiser, and therefore I shall go no further in scatter'd instances, but digest my farther Collections into a method more beneficial, which may be improved by any Practiser, as other matter shall occur.

Action of the
Case.

Quare defendens Crimen felonix ei impositum, &c. the Plaintiff cannot give in evidence words only, but Acts, as arresting, charging
or

of conventing him before Justice of Peace for felony. Sanders vers. Edwards Mich. 14 Car. 2. B. R.

If any action arises on request, as in Trover or special promise, the Statute of limitation goes only to the request. Juy's case. Mich. 1652. C. B. v. 1 Cro. 139.

Declaration for words spoken in the presence of A. B. and others, in evidence it sufficeth that they were spoken in the presence of others only, Wingfield and Coote, Lent Assises Norf. 1662. per Hale Ch. Baron.

In Indebitatus for carrying of Herrings, the evidence was, he was a Porter at Yarmouth, and when Herring-Ships came home, he went (of his own head) and carried up to the Defendants house, with other Porters, so many Herrings, and Good, by Twisden Judge of Assise Nort. Summer 1662. Jermin vers. Lucas.

In action for hindring to sit in a Pew claimed by prescription, repaired, &c. ought to be given in evidence; and one may prescribe to sit in the uppermost seat in a Pew. Buckston and Bateman, Mich. 14 Car. 2. B. R.

In action for executing an illegal Warrant, &c. It's good evidence to prove the Just. of Peace acted as such without shewing his Commission, so on the Statute of Hue and Cry. Constables case. Norf. Lent Assises per Hale Chief Baron.

Action for stopping up lights, &c. One had a piece of Ground and builds an house on part, and Leases it, then he sells the other part of the Ground to one who builds on it, and stops up the lights of the first house, the Lessee has a good action. But if two owe two pieces of Ground, and one builds, the other may also build and stop up his lights. Palmer vers. Flether Mich. 15 Car. 2. B. R.

If a Master always gives his servant money to buy his Markets with, it is good evidence to discharge the Master in an action brought against him for goods taken up on Trust, by that servant. Per Glyn Ch. Just. Mich. 1658. at Guild-Hall, Sr. Tho. Rouses case.

A water course runs through my Ground to the Grounds of J. S. where is a pit that time out of mind used to be filled with that water. I may stop the water in my Ground, and use it as I will, so I do not turn the course another way, but when I have done with

with it, let it fall into its own course, Per St. John Ch. Just. C. B. Suff. Summer Assises, 1657. Smart and Tystead.

Action for words, You forswore your self in your answer in Chancery. Defendant justifies. Plaintiff replies de Injuriâ suâ propria absque tali causa, per Hale Summer Assise, Suff. It's a good replication, and a small mistake in an answer shall not convict of perjury, for the Council may mistake or his Clerk.

Action for not scouring a Ditch, by which the water overflowed his Land, &c. and declare quod quidam Rivus run there, &c. Upon evidence it appeared only a Land-flood, and good by name of Rivus, though it be dy great part of the year; and it was held the best pleading of the course of this River to put a place from whence it comes, & so to the Plaintiffs Land, without mentioning mean places by which it passes, which may be many, and must be proved if laid, per Whitfield 1641. York, Clayton 96.

Souldiers lying in an Inn 14 days, are guests within the Custom of England, Harlands Case, per Whitfield 1647.

The Plaintiff in action of the case intitles himself by prescription, to a fold course for Sheep upon all the Lands in such a Field
on

Tryals per pais.

on Mich. day, and so to Lady day, the Lands being unfown, and for that the Defendant put on Sheep, &c. before Mich. day and after, and thereby fed the grounds, &c. the Plaintiff could not take so good feed. *actio inde.*

1. The owner may put on Sheep and feed his own grounds before Mich. unless a Custom be to the contrary, which ought to be laid in the declaration, *Contra* of a stranger.

2. It appearing that part of the Lands, &c. had been the Lands of the Plaintiff who was Lord of the Mannor, and prescribed as such, and there being no exception of those Lands in the prescription, the Plaintiff was nonsuit, for as to those Lands the prescription was gone by unity of possession. *Per Hale Ch. Baron, Norf. Summer Assises 1668. Branch v. Hunt.*

Assumpsit.

In *Indebitatus*, covenant to pay, is no evidence, 2 Cro. 505. nor money due for rent by specialty, or on Record. Hob. 284. Hunt. 35.

But an account stated for rent and other things, is good Evidence.

In *Indebitar.* for money, &c. delivery of Corn or other matter in satisfaction, is good

good evidence, Contr. in a special Action of the case on Assumpsit.

Indebit. lies not for money won at Dice ; Wiche's Case Hill. 14, 15 Car. 2. B. R.

If a promise be made to pay at a day certain, and the day is past, the Plaintiff may declare to pay on request : so if he declare on payment at a day certain, & give in evidence, a promise on request, i. e. when it's created on account which gives the duty, for there the time is ex abundanti ; but where the action is founded on the Contract, otherwise, for there the evidence must pursue the Contract. Hill. 1650. B. R. Child's case.

Promise to restore a Horse hired for a Journey, if the Horse dies in the Journey without the Riders default, his promise binds not. Lisle's case, cited in Matrauer's case Trin. 1651. B. R.

One brings an Assumpsit for 20 l. and gives in evidence a promise if two would surrender to pay them 20 l. a piece, good. Mich. 1655. E. R. Thomas and Gerye.

Indebit. for 50 l. brought by Edgar against Chetham Clerk. The evidence was, T. was indebted to Edgar in 50 l. Chetham desires Edgar to let him take the 50 l. of T. and he would give Edgar a Bill of Exchange
to

to receive so much at London: accordingly T. promises to pay Cherham the money, which promise he accepted, and gave a Bill of Exchange to Edgar; after T. became insolvent, then Cherham prohibits the payment of his Bill, whereupon this action is brought. Per Wadh. Wyndham Just. Ass. Norf. Summer 1663. the action lies, for Cherham having accepted the promise of T. and given a Bill, &c. is now become a Debtor to Edgar until his Bill be paid, though he never receives the money of Thompson.

In Indebitar. It is good evidence against the Father, that Whysick was delivered to his Daughter at his request, Stone-house vers. Bodvill Hill. 14 Car. 2. B. R.

One promises a Bayliff that if he would let one arrested be in his house that night, he would deliver him in the morning, it's a good promise, and the Bayliff or the Plaintiff may bring the action. Benson vers. French Pasch. 15 Car. 2. B. R.

Indebitar. The case was, the Plaintiff sold 60 Comb of Rye to the Defendant at 14 s. per Comb, to be delivered before Mich. the Plaintiff delivered 50 Comb before the time, and brought this action for the money for it, and good, though it was agreed the money to be paid on the delivery of the last Rye. per Hale Ch. Baron. 1. Though

1. Though the agreement is intire, yet the several deliberations make several contracts.

2. Though the payment was to be on the last delivery, yet a time being set for delivery, it's intended to be paid when the delivery should have been.

3. The time being past, it's now a duty, and so Indebitatus lies.

4. The Defendant has his remedy for not delivering the residue. *Baker vers. Surton. Lent Assise Norf. 1662.*

Indebitatus lies for a portion, after the Joynature settled, so for 1000 l. on promise of so much for every Horse-shoe nail, but the Jury may mitigate Damages. *ib.*

A promise to marry B. within 3 Months, within a Fortnight after they meet, and the party promises again to marry her within 3 Weeks, this last promise is no discharge of the former, being all within the time of 3 Months, but had the last promise been to marry her within some other time after the 3 Months, it had discharged the former. *Hire vers. Chaplin. Pasch. 1658. B.R.*

Indebitatus by one, Defendant gives evidence that another was partner with the
 C e Plain-

Plaintiff, at the delivery of the Wares, Plaintiff Nonsuit. Franklin vers. Walker, Norf. Lent Assise 1667. per Moreton. Contr. in Trespass, for there Joint-tenancy must be pleaded.

Indebitatus for 9 l. Defendant pleaded non assumpsit infra sex annos, issue inde, the Plaintiff proved a Debt of 9 l. due 10 years before, and an acknowledgement of the Debt within 6 years, and an offer to pay 5 l. for the whole.

Per Hale, The Plaintiff nonsuit, for the acknowledgement of the Debt is no more than is done by the Plea, but there must be a new promise of the Debt within 6 years to make the action hold, and here the promise or offer to pay 5 l. gives no action for the 9 l. Bass. vers. Smith Suff. Summer Assise 1668.

Debt.

Debt on a Bond to perform Covenants, to deliver possession at the Terms end to the Lessor or his Assignes; breach was assign'd in not delivery to two purchasers, demand being made by both, and issue join'd thereon, in evidence demand by one is good. 2 Cro. 475.

Debt

Debt on Bond to perform an award, in quod the award be delibered to the parties, in evidence, delivery proved to the wife is sufficient for the Jury to presume the delivery to the party himself, per Hale Norf. Summer Assise 1665. Trice and Prat.

At the same Assises per Moreton. Just. delivery to the parties Son is good evidence, Violet and Cook.

Debt against an Heir, &c. riens per descent, &c. a Jfeoffment given in evidence made before the action, that it was fraudulent may be given in evidence, though not pleaded, 5 rep. Co. Goaches case Hob. 72.

Debt against Executor, who pleaded ne unques, &c. Plaintiff replied that he Administred as Executor, and gave in evidence Administration granted to him, by which he Administred, Good. Dyer 305.

In Debt against Executors, and plene Administravi pleaded, the Defendant cannot give in evidence a Bond satisfied, where the Executor and Testator were obligors, per Coventry Lord Keeper 33 Eliz. Perkins vers. Perkins.

In Debt for Tythes, Modus to a Vicar is good against the Parson, and so is a
C c 2 Modus

Modus to a Parish Clerk, per Moreton Just.
Lent Chamber 1667. Barber vs. Cosier.

In Debt against Executor de son tort, who pleads ne unques, &c. It is sufficient to charge him, by proving he hath administered of never so little Value. Clayton 6.

Against Executor de son tort, who pleaded fully administered, the evidence was, the Intestate made a Will of Sale of his goods to the Defendant, who was bound with him in a Bond as surety, for his Counter security, but the goods remained in the Intestates possession during his life, for some few hours; ruled a fraudulent Deed by Barkley Just. at York. 11 Car. Legard and Linley. Clayton 39. quere.

If the Defendant pleads *plene*, &c. pre-
tor judge-
ments, &c.
The Plaintiff
must prove
Assets above
the sum of
those Judge-
ments. Hun-
tington, by
Judge Wind-
ham. 33 Car. 2.

Debt against Administrator, who plead-
ed *plene*, &c. and gave in evidence Judge-
ments, and good without pleading, per Hen-
den. 1638. York. Clayton 65. Quere, for
if Judgements be kept on foot by fraud, and
given in evidence, how can a Creditor who
sues for a just Debt, be prepared to detect
this fraud? And note, in *Scrie facias* a-
gainst an Executor on Judgement per Re-
stator, the Defendant pleaded fully, admini-
stered generally, and the Plaintiff demurred
specially, and Sir William Jones Solicitor ge-
neral moved to amend the Plea, and Hale
Ch. Just. thought he ought to plead special-
ly,

ly. how fully administered. Bradford vers. Hutchinson. H. 25, 26 Car. 2. B. R.

Debt for Rent on a Lease, the evidence to prove the Lease was, that the Plaintiff leased a House to the Defendant at a Rent, but no time mention'd, and it was agreed at the same time, that the Lessee was not to leave it without half a years warning, per Hale, Norf. Summer Assise 1668. It's a Lease at will, & the leasing on half a years warning, is but a Collateral agreement, and no part of the demise.

Ejectment.

The Plaintiff Counts of a joynnt Lease made by A. and B. in evidence it appeared that A. B. and C. were Joynt-tenants, that C. Leased to B. and that A. and B. Leased to the Plaintiff, by 3. Just. against two it's good. 2 Cro. Jurdanes case, fo, 83.

Count of a joynnt Lease made by two, in evidence it appears they were Tenants in Common, by 3 Just. against one, it's not good. 2 Cro. 166. Mantles Case.

Count of a Lease by Husband, evidence was a Lease by Husband and Wife with Letter of Attorney to make libery, and tis made in name of both, by 3 Just. against one it's good, for Libery as to the
Feme

Feme was hold. 2. Cro. Gardners case.

Of a Lease made 5. May 10. Regis habendum from Lady-day last past for 21 years Exunc prox. sequent. In evidence a Lease of 5 May 10. Regis habendum, from Lady-day last past for 21 years next following the date of the said Indenture, adjudged good and affirmed in Erroz. Hob. 19:

Ejectment of a Rectory, evidence of the taking of Tythes only, and not Entry in to the Glebe, the Plaintiff was nonsuit, Latch. 62. Hems and Stroud.

Ejectment of a Lease to A. of Lands in the possession of three Tenants for years, delivered to I. S. as an Escrow with Letter of Attorney, to enter into all, and then to deliver his Deed, &c. evidence, that the Attorney entered upon one Lessee in name of all, and delivered the Deed, &c. Per Jones Just. It's good enough, for where the Freehold is in one, his Entry into one Lessee for years in name of all the rest is good. Latch. 71. Dame Argells case.

Where one declares on a fictitious Lease to A. for three years, and within the same time declares of another fictitious Lease to B. of the same Lands, the last is not good. For Trespass for the mean profits must be brought in the first Lessees name, ut dicitur.

Ejectment

Ejectment of Tythes, a Lease for life of Tythes is good, if there be Church or Church-yard to make Liberty in, resolved in Tryal at Bar, Wheeler vers. Hanchet Hill. 14, 15 Car.2. B. R. v. Jones rep. 321, 322.

Entry and Claim made upon the Land within 5 years after the death of the Baron of the Countess of Peterborough to avoid a fine, the being issue in tale, proved by one Witness, and allowed at a Tryal at Bar, B. R. Mich. 15 Car. 2. Floyd and Polard.

Custom of Coppholders in extremis is to surrender into one Tenants hands, in the presence of credible Witnesses. A surrender was made accordingly, but presented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by Wadh. Wyndham Just. to be good, and by him, a Glove or a Turfe, is a Rod to give seisin by, Maye's case. Norf. Summer Assises 1663.

A Will under which Title to Land is made, must be shown it self, and the Probate is not sufficient. Contr. if it were on a Circumstance, or as inducement, or that the Will remain in Chancery, or other Court
by

by special order of such Court. Eden vers. Chalkhill. Mich. 13 Car. 2. B. R. 110
 As to Inrollment of a Deed, which needs no Inrollment, is no evidence. ib.

The issue was fine uncertain, or certain 2 years Rent and no more, the evidence was of assurances on surrenders uncertain, but all under 2 years Rent. Per Williams Just. you ought to produce fines on distress, and fines paid above two years Rent. 2 Bull. 32. Allen vers. Abraham.

A lease was made by parol and agreed to be put in Writing, and Indentures bespoke, but being held for Ten years, and no Indentures executed, it was ruled for a lease parol. Per Barkley Just. 13 Car. 1. York, Clayton 53.

By Just. Berkley (1638. York, Hedges cont. Clayton 57) a Will under Seal, proved examined by the original, was allowed good evidence. Quere, I think the practice against it.

A Lease and Release were given in evidence to entitle the Plaintiff, and they both were named hac Indentura, but were not indented, good, per Hale Ch. Baron, Norf. Summer Assises 1668. Briant vers. Trendle.

After

After default in Cteament the Defendant may confess a lease, Entry and ouster, and may give evidence, and have all advantages (except Challenges) and if the Plaintiff be comes non suit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Just. Bucks Lent 68 Dr. Crawle's case. Deprobation in spiritual Court for Simony disables from bringing Cteament, because he can make no lease, yet quare.

If Portgago continues in possession, without provision for that purpose in the Deed, he is Tenant at Will, and if he levies a fine it's no disseisin by him continuing in possession still, because after the Will decreed he is Tenant at sufferance, Per Hale Ch. Baron Bedford Summer Ass. 1669.

Declaration on a lease made 14 Jan. 30. Eliz. evidence of a lease sealed 13 Jan. good, for if it was a lease 13. it was a lease made 14. 4. Leon 14.

Feoffments of 40 years standing, and possession going accordingly, you need not prove Liberty, it may be intended per Jury. Roll. rep. 132.

The Common Rock on which so many
ff have

have split, is laying the Lease to be à die datus, and the Entry the same day, which is a disseisin, not purged by the Commencement of the Lease, for where an interest passes [à] is exclusive, and so the entry the same day, is before the Lease was to Commence, & is a disseisin, but in cases of Obligation where no interest passes, it is contra, quod nota.

Trespals.

Count of Trespals done in one acre, evidence of Trespals done but in half that acre, good. 2 Cro. Winkworths Case.

The Lady Hatton brought Trespals for breaking her Close, and taking away her Horse, &c. against two Defendants, they plead Not guilty, as to the taking of [Her] Horse, as to the rest, they say that the Horse of one of the Defendants was in the Close, &c. and they took him out doing as little damage as they could, *quæ est eadem*, &c. The Plaintiff replies *de injuriâ suâ propriâ*, &c.

The evidence was, that the Plaintiff as Lady of the Mannor took the Horse as an Estray, and it was Cried and Marked, &c. that the Defendants refused to pay for the meat, and took him away, before the year and a day was out.

1. Per Wadh, Wyndham Just. d' assize, A Lord may detain an Estray for meat, yet no Trespals lies if the owner takes him, but an action of the Case lies for the meat.

2. If the action had been brought against the servant only, he must justifie, &c. But being brought against Master and Servant, this joyn't justification is good.

Cambr. Summer Assises 1667. Lady Hatton against Cores and al.

In Trespals, the evidence for the Defendant was, that the Defendant had a Barn, and purchased a way over the Plaintiffs Land to that Barn, after the Defendant bought other Lands lying contiguous to that Barn on the one side and to a Haven on the other side, and carried Carriages by that way to the Barn, and through it over his own new purchased Land to the Haven. Per Hale Ch. Baron. If I purchase a general way to such a place, I may go from thence on my own ground whither I please, though I purchase the ground after the way purchased. Summer Assises Norf. 1665. Heyns worth vers. Bird.

Trespals was brought against many, by a School-mistress, for taking away a child (her Scholar) with a Scarfe of the Mi-
ff 2
stresses,

Tryals per pais.

stresses, per Keeling Ch. Just. In Trespass for taking [things] all are principals that are present and consenting. Contra, in taking [persons] and this action lies not by the officers for the tithes, but for the Scarfe only. Lent Term. Ass. 1663. Mary Coopers case.

Trespass lies for Lessee in Ejectment on a fictitious Lease to recover mean profits during the continuance of that Lease mentioned on Record: And the Recovery shall maintain it. Otherwise it brought by the Lessor, for he is no party to the action.

Trespass lies not for pulling down a Pew in a Church fastened to a pillar with a Chain. Contra, had it been fixed by nails driven into the pillar, per Glyn Ch. Just. Trevors case,

Trespass quare fregit liberam Warrenam suam, and took his Conies. In evidence it appeared that the Plaintiff had liberty of chase in the place, which though it includes Warren; yet a general Trespass lies not, but an action of the case. E. of Arundels case, Pasch. 1658. B. R.

Per Carl Sergeant, if Beasts be impounded, and the Key lost, the Officer by Key may break the pound, and deliver the Cattle,

Cattle, per Stat. Marlebridge 52 H. 3. 21.

Tenants in Common must join in Trespass done against them, in *Adams, Legg and Lamsteads case*, 7 Car. B. R. cited by Finch in Argument. Or Tenant in Common forbidding shall have Trespass.

In Trespass, the Defendant sets forth a conditional Feoffment for payment of money at such a day and place, and that he paid it accordingly; issue joined on the payment at the day and place, evidence of payment before the day is not good. Contra, had the special matter been pleaded with acceptance. More 47.

In Trespass with Continuando to recover mean profits, an Entry and possession of the Land before the Trespass must be proved, and also another Entry after the Trespass.

In Trespass, the Defendant prescribes to dig in the Common for Clay, to repair ancient houses holden of that Manour, and good. *Berney vers. Stafford* Norf. Lent Assises 1667.

In Trespass they were at issue on Not Guilty, and at the Assises the Defendant left his former plea, and pleaded an accord with satisfaction, the Judge would have

Tryals per pais.

have had it replied to and tryed presently, but the Councel refused, whereupon the Jury was sworn, and the Plaintiff nonsuited. Bedford Assises Lent 1667. Green vers. Reynolds. But this was contrary to the opinion of Sir Orlando Bridgeman, at the same Assises, and Contr. to 10 H. 7. 21. and 1 Bul. 92.

Trespals lies by Recoveroꝝ in Erroneous Judgement for a mean Trespals, because the Plaintiff in Writ of Error recovers all mean profits, and the Law by fiction of relation will not make a wrong doer punishable. 13. rep. Co. 22. but Contra, where Act of Parliament restores, &c.

Trespals for assault and wounding in Suff. the Defendant as to vi & armis non Cul. As to the other justification of moliter Manus, &c. in Norf. and severall Tryals. Per Hale Ch. Baron Suff. Ass. Summer 1668. the vi & armis can't be tryed till the other be tryed. Contr. If the first issue of non Cul. was as to the wounding: and by him evidence of Liberty of session, generally shall be intended for life only.

The Hogs of B. were put into the yard of A. and broke into the Land of C. and did Trespals, action lies against A. though the servant of B. did look to them and serve them,

them, by which the owner had the special possession of them. So if Agisted Cattle do Trespass, the Agistor shall answer. Dawtry vers. Huggins, Clayton 33. per Barkley. 11 Car. York.

A. by Indent. of uses raised an Estate to B. in Fee, who regrants Turbary to A. by another Deed, and after A. levies a fine to confirm the Estate and uses abovesaid declared, this doth not touch the Turbary, per Vernon, 11 Car. York, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 Jac. 5. to plead general issue, and give the special matter in evidence. Clayton 54.

Prescription to tether Equos & Boves upon such a balk, &c. Mares and Cowes, good evidence within that prescription, Per Barkley Clayton 54.

Per Hale, A Corporation may bargain and sell, though, it has been thought an use upon use, they being seized to the use of their house. But I think it rather a trust than an use.

If a Just. of P. send his Warrant to I. S. (who is no Officer) to bring one before him, if I. S. be no Officer, he is not bound to execute it, yet if he does execute it, it's good, and he may execute it in any part of the County. And so a Constable of one Town may

may execute a Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, per Hale Norf. Summer Assises 1668. Wrongs case.

In Trespals against one for Cleaning on his ground, per Hale Norf. Sum. Assises 1668. The Law gives licence to the poor to glean, &c. by the general Custom of England, but the licence must be pleaded specially, and can't be given in evidence on non Cul.

Trover.

The Citizens of London gave in evidence their Custom to take Toll. Jones 240.

In Trover, for an Horse proved of 15 l. value, the Jury gave but 3 l. damages, upon mistake, they thinking that the Plaintiff had his Horse again.

Per Wadh. Wyndham; if the Jury had not been gone, they should have mended their Verdict, but a new action of Trover lies for damages for the Horse, in which the Jury shall prove the 3 l. given was only for the conversion, not the value of the Horse; and by him, Trover lies for goods in the Plaintiffs possession, to recover damages for the conversion only. Tyndal vers. Jolliffe Norf. Lent Assises 1660.

In Trover by Administrator where the conversion was in the time of the Intestate, the Plaintiff must shew the Letters of Administration, Contr. where the conversion was after his death. Per Hale Norf. Sum. Ass. 1660.

If an Estray be claimed within the year and the day, &c. and the Lord refuses to deliver it; Trover lies, though the keeping is not paid for, and the Lord says he detains for the same, and the Lord can't detain for the meat, &c. but must bring his action. Per Moreton Just. Lent Norf. 1667. Bond vers. Paston, Quære, & vide Dent tit. Trespas, per Wyndham Contr. and I think is Law.

At the same Assises, Daniel vers. Berney, by Moreton Just. Proclamation may be made of an Estray by any person, and it is not necessary, that it should be made by the Well-man or any other Officer. Vide Co. Entries 170. Barber vers. Fawcet, In Trover, issue was joyned, on tender of amends for keeping, &c. and Verdict pro Plaintiff and judgement.

Note, I find precedents, that in Trover, the matter of an Estray may be pleaded specially, or given in evidence on Not guilty.

Dats were taken from the owner, and carried to a Miller to make into Dat-meal, and before it was done, the owner prohibits the Miller, &c. and demanded the Dats, who, notwithstanding, made them into Date-meal: Per Barkely it's a conversion in the Miller. 163°. Clayton 57. Hollworth's case.

On non Cul. The Defendant gave in evidence, a seizure for goods Foreign bought and Foreign sold: Per Custom of Lynn Norf. good per Hale, Norf. Sum. Ass. 1668. Harwich vers. Twells.

A man lends his Horse to a special purpose, the Bailee abuses the Horse, and oher works him, then the lender takes the Horse again: Per Hugh Wyndham Just. Lent. Assises Bucks. Trover lies not, Constables case.

Dower.

In Dower, the issue was ne unque seisie que Dower, and for the Plaintiff, a Feoffment in Fee was given in evidence to the Husband, the Defendant would have given in evidence, a seisin in taylor with a discontinuance, and then the Feoffment, &c. and so a remitter, but it ought to be pleaded per Cor. Dyer. 41.

If an Heir Mortgage for years and then assigne Dower legally i. e. a 3. part of the whole, the assignment shall bind the Mortgagee; Cont. if the assignment be illegal, as of one whole Mannor when there were three Mannors; that being not as the Law would have done it. And if a disseisor assigne a legal Dower, it's good: But if the Heir Mortgage in Fee, and then assigne, &c. legally, &c. that is not good, because the whole Freehold was out of him at the time of assignment: Per Hugh Wyndham Just. Bucks Lent Ass. 1668.

Account.

Against S. as receiver of two 30 ls. and as Bayliff for receiving his Rents for several years, not saying any certain sum of Rents: Per Earl Sergeant, the proper way is to find quod Computet, as to what is certain in the declaration and so proved, as the money was, but not to the Rents, and so he said was the opinion of Hale. But per Moreton Just. the Verdict shall be general, and it may be both ways. Saye's case Norf. Lent Assises 1667.

Thus far I have made an Essay of a method, to be further built upon by our Practiser, and have given some cases, not in Print, and (it may be) useful. I shall add some other cases, not so proper for heads except that of

[Evidence] with which I shall conclude this Chapter.

Evidence.

Inspection of a Deed Inrolled may be given in evidence, Contr. of a bare Deed not Inrolled, or of a Deed that needs no Inrollment. Pasch. 1655. B. R. Goodson's case.

A Deed to Lead the uses of a fine was Inrolled on the acknowledgement of but one of the parties to it, & was allowed by Glyn Ch. Just. in evidence, as Roll Ch. Just. had done before him, though no binding evidence, Turber vers. Maddison Pasch. 1655. B. R.

An office found at a death, &c. may be given in evidence.

A Verdict against one, under whom either Plaintiff or Defendant claims, may be given in evidence against the party so claiming, contr. If neither claim under it. Duke and Ventres Mich. 1656. B. R.

If an Action be brought on a Statute, which has severall provisions in it, the Defendant may plead,

plead, not guilty, and aid himself by any of the provisoes in evidence : But if provisoes be made to that Statute, of which the Defendant may take advantage, he ought to plead it, and not give it in evidence, per Roll. Ch. Just. Mich. 1650. B. R. Jones 320. accord.

Joinder in trespass cannot be given in evidence ; but must be pleaded in Abatement. Jones versus Randal, Hill. 1652. C. B.

Arrest and Imprisonment to prove a Bankrupt must be proved by Record : Newby versus Bathurst Pasch. 1659. B. R. In a Tryal at Barr.

The custome of New-England, to marry by the Magistrate in the presence of a Minister, was allowed good by Hale Ch. Just. B. R. Trin. 1663. at Guild Hall, int. Hall & Hall.

The Certificate of the King under his Sign Manual was allowed in Chancery for proof without exception, Hob. 213.

Records, as Patents, Statutes, Judgments, may be given in Evidence, Hob. 227. contr. to Dyer 129.

When

Tryals per pais.

When Records are pleaded, they must be
Sub pede Sigilli, Contr. if given in Evidence.
Stiles 22. Whites case.

An answer in Chancery, is Evidence a-
gainst the Defendant himself; but the Bill
must be proved. Godb. 326.

Upon a traverse of a Lease parol for years,
viz. Absq; hoc quod A. demisit, &c. Nihil has
bit in tenementis, may be given in Evidence.
Dyer 122.

Shewing a Grant to digg Turfs, is no E-
vidence against a Prescription for the same,
but the Grant being the same with the Pre-
scription, shall be taken as a confirmation.
Crew & Vernon, Moore 819. Quære tamen.
v. Moore 830. Where a Court of Pipowder is
claimed by Prescription and Grant, and good.
2 Cro. 313. Acc.

In Trespass for taking Goods, after Judg-
ment, per confession, non sum informatus, or
nil dicit, Property need not be proved to a Writ
of inquiry; for it would oppose the first Judg-
ment, Quod querrens recuperet; and the
Judges

Judges might have Assessed damages if they would. Yelv. 151. Yet quære, if the Defendant may not disprove property in mitigation of Damages; for the Jury may find no Damages.

A Copy of a Deed, is good Evidence where the Defendant has the deed, and will not produce it. Per Vernon just. Clayton 15.

A deed of Feoffment without Livery may be given in Evidence as a Release. Per Berkly 11 Car. Clayton 32.

If a Fine be given in Evidence, with five years non clayme, &c. the fine must be shewed with the Proclamations under Seal, and the Chirograph will not serve.

The confession of a party must be taken whole, and not by parts; As if to prove a debt, it be sworn that the Defendant confessed it, but withal he said at the same time, That he paid it, his confession shall be valid as to the payment as well as that he owed it. Per Hale Ch. Just. And so is common practice.

A deed cancelled by practice, was allowed to be read, in Evidence in action under that Deed, the practice being proved. Heily 138.

Against a Purchaser bona fide, recital in a Deed of money paid is not sufficient, nor acquittance for the money, unless it be of ancient standing, and then it shall be presumed.

The Deed to lead the uses of a fine sur concessit, need not be proved per Testes.

If a deed of Feoffment be shown, but no Livery, possession going with the Deed, is Evidence to a Jury to find Livery.

At Guild Hall Trin. 23 Car. 2. Hale Ch. Just. cited the Case of Sir Paul Pindar, A Levrier, &c. was proved by a recital of it in another Record, and Hale and Mainard demurred on the Evidence, and abjudged against them, for this Cause, viz. That it was proved, there was such a Record, that it was filed, that it was taken off the file. But (by hint) generally without such proof, the evidence is not

not good, because one Record may recite one that never was.

The Jury are to decide the fact, and evidence is not given but to inform them in their consciences of the truth, for although no evidence is given of either side, yet they may give their verdict of one side or the other. 14 H. 7. 29. And therefore although two witnesses are necessary, where the trial is by witnesses, as in the Civil Law; Yet they are not of necessity, where the trial is by Jury. And where witnesses are joined with the Jury, yet they may be rejected, if they will not agree with the twelve, and the twelve may give their Verdict. Office of the Jury.

The Jury after they are departed from the Barr, may return to hear their evidence of any thing they doubt before the Verdict.

Sur Travers de done in taylor, the witnesses probe, That another made the Done; this doth not warrant the issue. Done in Tayle.

In an action against the Sheriff upon Extortion
 Wh the vers. Vic.

the Statute of Extortion, That he took it for Barretée of one who was acquit, is good evidence.

Possession.

Possession is an evidence of right, and he that hath possession may distrain the Cattle of him that hath no title, for the taking is in respect of the possession, more than of the title.

Debt for Rent.

In debt for Rent upon a Lease, and nil debet pleaded, ne unques seisie de terre is good evidence, otherwise upon the plea of riens arrere, or levy per distresse.

Parson.

Parson or not Parson, in such issue you may give in evidence a resignation, although it be in another County and Spiritual.

Fait.

In riens passe per le fait, Not his deed may be given in evidence.

What ought to be proved in evidence.

In Trespass, quare claus. fregit, with abuttals, all the abuttals and descriptions must be proved. But if the abuttal be laid North, &c. and it incline North, though not directly, it is sufficient: & sic de ceteris. Upon

Upon this Issue, the account given to the Ordinary, shall not be given in evidence, nor any respect had to it. *Plene administravit.*

Will, The probat is good for the personal estate, but not to prove a Will in writing of Land by the Statute. *What shall be given in evidence, and what is good evidence.*

Recital of other Grants by Letters Patents, in Letters Patents are some evidence, but not fit to be allowed, without showing the former Letters Patents or a copy. But the Jury may find them. *Recital in Letters Patents. Surmise in a Prohibition.*

The proof of this surmise in any Court of Record, shall not be given in evidence in another action, upon the same custome, because the Defendant in the prohibition cannot cross examine.

Depositions.

Depositions in the Court Christian, in the Court of the Council of York touching the title of Land, of which they have not consance, or in another Suit against him who claimeth not under those parties, by the Commissioners upon a Commission of Bankrupt, because the party could not cross examine: shall not be allowed in evidence.

U h 2

But

Sentence.

But a sentence given in the spiritual Court touching Tithes may be given in Evidence in an Action at Common-Law, for this is a judicial act.

Former Tryal.

After evidence given, and the Jury ready to give their Verdict; and then the Attorney General will not proceed, but draws a Juror, and brings another information, none of the former Jurors shall be admitted to give in evidence, that the Jury were ready to give their Verdict against the King in the first information, for this ought not to be discovered, for so no benefit would accrue to the King by his Privilege to draw a Juror.

What may be given in evidence upon a special Issue.

But this may be given in evidence in another action, where the King is not concerned.


Debt for rent.

In debt for rent upon non demisit, that the lessor riens avoit in the land at the time of the demise, may be given in evidence.

Common.

Upon an Issue of Common appendant, &c.
common

common per cause de vicinage, cannot be given in evidence.

 If the Defendant plead son assault demesne in Battery, and the Plaintiff reply, de injuria sua propria absq; tali causa, And so issue is joyned, if there was a battery at another day than what the Plaintiff and Defendant have assigned, upon the Plaintiff, and another upon the Defendant by the Plaintiff, The Verdict ought to be for the Defendant; for if the Defendant prove any assault made upon him by the Plaintiff, this ought to be found for him, although it was at another day than what he hath alledged, for the day is not material: But upon such speciall justification the Defendant hath liberty to prove his Plea at any time, and the Plaintiff might have made a new assignment at another time, for peradventure there might be several trespasses at several times, to which the Defendant may have several Pleas, and therefore if such manner of pleading should not be allowed, and such evidence, the Defendant could not tell how to help himself, nor could know for what Trespass the action is brought. Vide devant hic & apres cap. 13.

Son Assaule
demesne in
Battery.

Surrender.

If the Issue be whether the Kings Tenant by Letters surrendered to the King or not, the accepting of new Letters Patents, which is a surrender in Law, is good evidence.

Non assump-
sit.

In a special promise to pay 20 l. if the Plaintiff would pay 10 l. &c. and an averment that he paid the 10 l. upon non assumpsit, the Defendant shall not give in evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the issue is upon the assumpsit, and not upon the payment of the 10 l. which might have been traversed. And although 'twas said that in all actions there is a general issue to be taken, which shall put all the declaration in issue, and that must in this be non assumpsit, or nothing, yet by the advice of all the Justices of Serjeants Inn in Fleetstreet, it was ruled as abovesaid. Mich. 16 Car. B. R. between Holditch and Brodrig. I have been the more particular in this, because I have known Plaintiffs nonsuited in such cases at the Assizes for want of proving the averment: although I must confess I never agreed with the Judge herein that did it. For it is a mistake to say, The Plaintiff must in all cases prove his whole Declaration, if he proves the mat-
ter

ter in issue, he ought not to be nonsuited.
Rolls tit. Tryal. 1681.

If an Adbolowson be pleaded to be granted Per fait, and this issue is taken by a stranger to the fait, if it be found granted sans fait, or by another fait, it is good, for the Deed is surplus, and the effect of the issue is upon the grant not upon the fait.

Grant per fait. Where it is sufficient to prove the effect of the Issue.

If an Imprisonment by dures at D. be in Issue, 'tis not material whether he was ever at D. or not, for the effect of the Issue is, if the Deed was made by dure.

Dures.

So of a Feoffment pleaded by Deed, a Feoffment without Deed or another Deed is good, for the effect of the Issue is upon the Feoffment, not upon the Fait.

Feoffment.

In escape of a Prisoner, and the Issue is, if the Gaoler immediately after the escape made fresh suit, if the Prisoner hath escaped a day and night before the Gaoler knew it, and then he makes fresh suit, it is sufficient to prove the effect

Fresh Suit.

effect of the issue, for convenient pursuit is immediate fresh suit in Law.

*Non demisit
modo & forma.*

If in pleading an Indenture of demise you mistake the recital, and the issue is non demisit modo & forma; The mistake shall not hurt, for the effect of the Issue is upon the demise.

What thing
may be given
in evidence
upon the ge-
neral Issue.
Trespas.
Battery.

If a man plead not guilty, he cannot give in evidence a matter justifiable, which shall be a confession of the act, for this is contrary to the issue. As son assault demesne in Battery, upon Not guilty: but upon Not guilty, in Trespas for beating ones Servant, per quod servitium amisit, you may give in evidence that the Plaintiff did not lose his service by the Battery.

Wast.

For upon nul wast fait, can he say, sufficient repair devant le brief purchase.

Servant.

If my servant without my consent, put my Cattle in the Land of another, I may plead Not guilty, and give this matter in evidence; for by putting the Cattle in, the servant has gained a property.

Information.

Upon Not guilty, he may give in evidence a discharge by a Proviso in the same Stat. for thereby he is Not guilty, Contra formam Statuti, but not a discharge by another Statute.

Upon

Upon non habuit sententiam ad firmam contra formam Statuti, the Parson may say, he took the Farm for maintenance of his house according to the Proviso in debt upon the Stat. 21. H. 8.

But upon the Stat. 5 E. 6. for ingrossing upon Not guilty, 'tis said, that the Defendant cannot give in evidence a licence according to the Proviso of the Stat. sed quære rationem.

Upon ne unque son Receiver, &c: the Accompt Defendant cannot say that he paid the money according to directions, &c.

In a Scire facias against Tertenants and a Feoffment pleaded before the judge, ^{Seisin Feoffment.} ment absque hoc that he was seised tempore Judicii, and issue upon the seisin, that the Feoffment was fraudulent, to defraud the judgement, may be given in evidence; but otherwise if the issue had been upon the Feoffment.

So upon reins per discent, by an Heir ^{Riens per discent.} in debt upon an obligation, that the Defendant; Aliened the Assets by fraud and cohin,

cobin, and so hold by the Stat. of 13 El. may be given in evidence, because these are the general issues.

Parcel.

In Trespas for taking a stack of Corn, the evidence may be of part, and the Verdict as to 4 Combs or Bushels, Guilty, and as to the rest Not Guilty.

Plenè administravit.

Upon this plea the Executor may give in evidence a retainer for a debt due to himself, of as high a nature: or payment of debts with his own money, and that he kept goods of the Testator in lieu, for this alters the property.

What evidence the Jury may have with them. Exemplifications.

They can have nothing but what is delivered to them in Court, and given in evidence by the party in Court, if an exemplification come out of Chancery of witnesses examined there upon Oath who are dead, the Jury shall have this with them; but if the exemplification comprehend some witnesses alive and some dead, they shall not have it with them. Neither shall they have any Pedegree drawn by a Herald at Arms, for it is no evidence but only information for direction. What Evidence the Jury may have with them, see the 14. Chapter.

Pedegree.

If a man makes a Feoffment and after, Who may be
wards makes another, with covenants witness.
that he was seised, &c. and afterwards Not persons
an issue is taken upon the first Feoffment, interested.
the Feoffee shall not be a Witness.

In an information for Usury, the Usury.
party shall not be a Witness, because
he would thereby avoid his own Bonds,
&c. and he testis in propria causa.

Three men swear an Arbitrement, in Perjury.
three several actions against them upon
the Statute 5 Eliz. of perjury, each of
them may be a Witness for the other;
but in an Indictment of perjury, upon 5
Eliz. the party grieved shall not be a Wit-
ness, for he isto have 20. l.

Common experience tells us upon an In-
dictment for Battery, &c. the party grieved
may be a Witness, because 'tis only for
the King.

In an action against the Hundred up Hundred.
on the Statute of Winton, &c. the Rel-
for living out of the Hundred may be a
Witness, for 'tis not reason that he and

his Lessee being an inhabitant should be both charged: If the Serbant be robbed of the Masters money, the Master may be a Witness to prove the delivery of the money to the Serbant before the Robbery. Rolls tit. Tryal 686.

Proceedings
in Ecclesiasti-
cal Courts.

A thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in evidence to Juries, for the Courts of Common Law are not to be guided by their proceedings. Mich. 22 Car. B. R.

Matter in
Law.

Matter in Law is not to be given in evidence, for the Jury are only to try matters of fact.

Ancient Wri-
tings.

An ancient writing that is proved to have been found amongst Deeds and evidences of Land, may be given in evidence, although the executing of it cannot be proved, for 'tis hard to prove ancient things, and finding them in such a place, by presumption, they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty. 24 Car. B. R.

A writing or answer permitted to be read in part, may be read in toto. Totum & pars.

A Copy of part of a Record cannot be given in evidence, unless 'tis proved that the part shewed in evidence is all concerning the matter in question. Copy of Records.

A transcript of a Record or Enrollment of a Deed may be given in evidence, for they are things to be credited being made by Officers of trust. Transcript Enrollment.

The Council of that party who doth begin to maintain the issue, whether of Plaintiff or Defendant, ought to conclude. Council.

A Juror who is a Witness, must be also sworn in open Court to give evidence, if he be called for a Witness; for the Court and Council are to hear the evidence as well as the Jury.

The Jury may carry from the Bar an Exemplification under the Great Seal of Depositions in Chancery, but if they are not

not exemplified, the Jury can only look up,
on them at the Bar, but not have them
with them out of Court.

Lease upon
an Outlawry.

If one produce a Lease made upon an
Outlawry, to prove a title, he must also
produce the Outlawry it self: but if it be
to prove other matter, he needs not shew
the Outlawry. And so it is of an Extent,
without shewing the Statute or Judge-
ment on which the Extent is grounded.

Office.

By Rolls an Office found after the
death of a Tenant in Capite, of Lands
in another County, may be given in evi-
dence to try the title of those Lands, if
there was a special Liberty granted unto
the Heir.

Bail.

If a Witness be Wapl, upon motion
the Court will give leave to alter the Wapl.
Stiles 385.

Charges.

Debt for 10 l. against a Witness, upon
the Statute 5 Eliz. doth not lie, unless
the Witness hath his charges, and he is
not bound to come without his Charges
first paid: but if he accepts of 12 d. and
a promise for the rest at the tryal, he
is

is bound, and an action lieth against him
if he doth not come. Cro. 1 part 522. 540.
Goodwin against West.

A Counsellor may be examined as a Counsellor.
Witness against his Client, so far as it
is of his own knowledge, not what his
Client reveals to him, and he knows
only by his Clients information.

In Criminal causes against the King Criminal
Witnesses may be sworn, unless the Crime causes.
be Capital.

Tenant at Will of part of the Lands Tenant at
was admitted to prove Liberty of sei. Will.
sin and the execution of a Feoffment
under which he held. Bulst. 1 part 202.

If one be attainted of Felony and par. Attainted of
bonded, he shall not afterwards be sworn Felony.
of a Jury, for Poena mori potest, culpa pe-
rennis erit, and therefore is not fit to serbe on
the Inquest, nor yet to be an indifferent
Witness, and two such persons probing
a suggestion, were rejected, and the prohibition
disallowed. Brown against Crasham Bulst.
2 part. 154.

Simul cum.

In Trespals with a simul cum, if no-
 thing be proved against them in the simul
 cum, they may be examined as Witnesses.
 Stiles Reports 401.

C A P.

C A P. XII.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury; of the Tryal *per medietatem linguæ*; when to be prayed, and when grantable. Of a tryal betwixt two Aliens, by all *English*. Of the *Venire facias*, *per medietatem linguæ*, and of Challenges to such Juries.

THe Jury having heard their Evidence, let them now consider of their Verdict; But first they must remember their Oath, which in effect is, To find according to their Evidence; and therefore they should have had it before the Evidence; but that the form and order of the *Venire facias*, (which I have tyed my self to follow,) leads me to it after their Evidence, in these words; Ad faciend. quendam Juratam; I have already shewed the derivation of this word Jurata, and what is the legal acception of it; only observe with our great Master Littleton, That the word Assize, is sometimes taken for a Jury; so as the Learned Commentator

Assise, Enquest and Proof, are taken for the word Jury. Vide 28 E. 3. 13.

See Chap. 12

1 Inst. 154.

Affiza for *Ju-*
rata.

The Juries
Oath.

Why called
Recognitors
in an Affise,
and Jurors in
a Jury.

12 Knights.

both well paraphrase, That the word Affise, is Nomen Equivocum Equivocans, because sometime it signifieth a Jury, sometime the Writ of Affise, and sometime an Ordinance, or Statute; But Jurata, is Nomen Equivocum Equivocatum, because we always understand that word (according to the aforesaid definition) to be a Jury of twelve men, so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between party and party, according to their Evidence.

And as in an Affise, the Jurors are called Recognitors, from these words in the Writ of Affise, facere Recognitionem; so upon a Nisi prius, they are called Juratores, from these words in the Venire facias, Ad faciend. quandam Juratam.

In ancient time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were 12 Knights, as appears by Glanvil, lib. 2. cap. 14. and Bracton, fol. 116.

The next words of the Venire facias, are Inter partes pr. dictas. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the party, and a Stranger to the Writ. and Issue; I will now shew what the Jury shall be, when one of the parties is an Alien, the other a Denizen; and when both parties to the Issue are Aliens.

This

This Tryal is called in Latine, *Triatio* *Jury per medietatem linguæ.* And this Tryal by the Common Law was wont to be obtained of the King, by his Grant made to any Company of strangers, as to the Company of Lombards, or Almaines, or to any other Company, that when any of them was impleaded, the moyety of the Inquest should be of their own tongue. Stan. Plea, Cor. lib. 3. cap. 7.

And this Tryal in some Cases, per medietatem linguæ, was before the Conquest, as appears by Lamb. fol. 91, 3. *Viri duodecim Jure consulti, Angliæ sex, Walliæ totidem, Anglis & Wallis Jus dicant.* And of ancient time, it was called *Duodecim virale Judicium*. 1 Inst. 155. *Its Antiquity.*

But afterwards, this Law became universal: first by the Statute of 27 Ed. 3. cap. 8. It was Enacted, that in Pleas before the Mayor of the Staple, if both parties were strangers, the Tryal should be by strangers. But if one party was a stranger, and the other a Denizen, then the Tryal should be per medietatem linguæ. But this Statute extended but to a narrow Compass, to wit, only where both parties were Merchants or Ministers of the Staple, and in Pleas before the Mayor of the Staple. But afterwards, in 28th Year of the same Kings Reign, cap. 13. It was Enacted,

That in all manner of Enquests and Proofs, which be to be taken or made amongst Aliens, and Denizens, be they Merchants, or other, as well before the Maior of the Staple, as before any other Justices, or Ministers, although the King be party. The one half of the Enquest, or Proof, shall be Denizens, and the other half Aliens, if so many Aliens and Foreigners be in the Town, or place, where such Enquest or Proof is to be taken, that be not parties, nor with the parties in Contracts, Pleas, or other Quarrels, where of such Enquest or Proof ought to be taken: And if there be not so many Aliens, then shall there be put in such Enquests or Proofs, as many Aliens, as shall be found in the same Towns or places, which be not thereto parties, nor with the parties, as aforesaid is said, and the Remnant of Denizens, which be good men, and not suspicious to the one party, nor to the other.

King.
R. 3.

So that this is the Statute which makes the Law universal, concerning the mediocritatem linguæ; for though the King be party, yet the Alien may have this Tryal. And it matters

matters not, whether the Moyety of Aliens, be of the same Country as the Alien, party to the Action, is : for he may be a Portugal, and they Spaniards, &c. because the Stat. speaks generally of Aliens. See Dyer 144.

And the form of the *Venire facias*, in this Case is *De viceret. &c. Quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis, &c.* And the Sheriff ought to return 12 Aliens, and 12 Denizens, one by the other, with addition which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holden as a mis-return, by the Statutes of 18 Eliz. Cro. 3. part 818. 841. So that Brooks says, it is not proper to call it a Tryal per medietatem Linguae, because any Aliens of any tongue may serve. But under his favour, I think it proper enough.

*Venire facias,
per medietatem
linguae.*

For people are distinguished by their Language, and *Medietas Linguae*, is as much as to say, half English, and half of another tongue or Country whatsoever. Though it be not material of what sufficiency the Jurors are, yet the form of the *Venire facias*, shall not be altered, but the Clause of *Quorum quilibet habeat, 4 l. &c.* shall be in, Cro. 3. part. 481.

But suppose that both parties be Aliens, of whom shall the Inquest be then ? It is resolved,

solved, that the Inquest shall be all English ; for though the English may be supposed to favour themselves more than strangers, yet when both parties are Aliens, it will be presumed, they favour both alike, and so indifferent. 21 H. 6. 4. but if the Plea be before the Maioꝝ of the Staple, and both parties Alien Merchants of the Staple, it shall be tryed by all Ali ns. Stamford's Pleas del Corone. 159. A Scotchman is a Subject, and shall not have this Tryal. Egyptians are also excluded when tryed for Felony, made by the Statute against them, 1 Phil. & Mar. cap. 4. 5 Eliz. cap. 20.

All English.

Where an Alien is party, yet if the Tryal be by all English, it is not erroneous, because it is at his peril, if he will slip his time, and not make use of the advantage which the Law giveth him when he should. Dyer 28.

When the Alien should pray a *Venire facias per medietatem*.

The Alien ought to pray a *Venire facias*, per medietatem linguæ, at the time of the awarding the *Venire facias*: But if he doth it at any time before a general *Venire facias* be returned and filed, the Court may grant him a *Venire facias*, de novo. Dyer 144. 21 H. 7. 32. though it hath been questioned.

Tales.

But if he hath a general *Venire facias*, he cannot pray a *Decemtales*, &c. per medietatem linguæ, upon this; because the Tales ought

ought to persue the Venire facias. 3 E. 4. 11, 12. And so if the Venire facias be per medietatem linguæ, the Tales ought to be per medietatem linguæ, as if 6 Denizens, and 5 Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, li. 10. 104. But if in this case the Tales be general, de circumstantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it shall be intended well awarded. Cro. 3. part. 818. 841.

If the Plaintiff or Defendant be Executor or Administrator, &c. though he be an Alien, yet the Tryal shall be by English, because he sueth in aut droit; but if it be averred that the Testator, or intestate, was an Alien, then it shall be per medietatem linguæ. Cro. 3. part 275.

Where the Tryal of an Aliens cause shall be by English.

Mich. 40. & 41 Eliz. The Queens Attorneys exhibited an Information against Barre, and divers other Merchants, some whereof were English, and some Aliens: After Issue, the Aliens prayed a Tryal per medietatem linguæ. But all the Justices of England resolved, that the Tryal should be by all English, and likened it to the case of privilege, where one of the Defendants demands privilege, and the Court, as to his Companion cannot hold Plea, there he shall be ousted of his privilege, sic hic. More 557.

Part English, and part Aliens.

By

Challenge.

By the Statute of 8 H. 6. cap. 29. 29. Insufficiency, or want of Freehold, is no cause of Challenge to Aliens, who are impannelled with the English, (notwithstanding Stamford's Opinion. Pl. Coron. 160) for this Statute saith, that the Stat. 2 H. 5. 3. shall extend only to Enquests betwixt Denizen and Denizen.

When the Alien should pray a *Venire facias per medietatem*.

If the Defendant do not inform the Court that he is an Alien, upon awarding of the *Venire facias*, and so pray a *Venire facias*, per medietatem linguæ; he cannot challenge the Array for this cause at the Tryal, if the Jury be all Denizens (notwithstanding Stamford's Opinion to the contrary, and the Books cited by him, fol. 159. pl. Cor.) For the Alien at his peril should pray a *Venire facias*, per medietatem linguæ. Dyer 357. Vide Rolls tit. Trial, 643.

If the Plaintiff be an Alien, he must suggest it before the awarding of the *Venire facias*; but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the *Venire facias*, because the Defendants quality may not be known to him before. 27 H. 7. 32.

C A P. XIII.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by default. Inquests of Office, &c. Arrest of Judgment, Variance betwixt the Narrand the Verdict, &c.

Verdict or Verdict; In Latine, Vere dictum, quasi dictum veritatis, As Judicium, est quasi Juris dictum: Is the Answer and Resolution of those 12 men; concerning the matter of fact referred to them by the Court, upon the Issue of the parties. And this is the foundation, upon which the Judgment of the Court is built, for ex facto jus oritur; the Law ariseth from the fact; Wherefore it is no wonder, that the Law hath ever been so curious, and cautelous, as not to believe the matter of fact, until it is sworn by 12 sufficient men, of the Neighbourhood where the fact was done, whom the Law suppoeth to have most cognisance of the truth, or falsshood thereof: which being

B b

sworn

The Credit of
Verdicts.

(for the words are, Juratores predict. dicunt super sacrum suum, &c.) is the Verdict, whereof we now treat; And such credit doth the Law give to Verdicts, that no proof will be admitted to impeach the verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no Superseas is grantable by Law. Pl. Com. 496.

And it is worth our observation, that the Law seems to take more care of the fact, than of her self; for the Major part of the Judges give the Judgement of the Law, though the other Judges dissent. But every one of the 12 Jurors must agree together of the fact, before there can be a Verdict, which must be delivered by the first man of the Jury. 29 Affise. pl. 27.

General or
special.

And this Verdict is of two kinds, viz. one general, and the other special, or at large.

General Ver-
dict.

The general Verdict, is positively, either in the Affirmative, or Negative, as in Trespass, upon Not guilty pleaded; The Jury find Guilty, or Not guilty; And so in an Affise of Novel disseisin, brought by A. against B. The Plaintiff makes his plaint, Quod B. disseisivit eum de 20 acris terræ, cum pertinentiis, The Tenant pleads, Quod ipse nullam injuriam seu disseisinam preiatis A. inde fecit, &c. The Recognitors of the Affise do find, Quod predict. B. in iuste & sine iudicio disseisivit

disseisivit predict. A. de predict. 20 acris terræ cum pertinentiis, &c. This is a general Verdict. 1 Inst. 228.

A Special Verdict, or Verdict at large, is Special Verdict. so called, because it findeth the special matter at large, and leaveth the Judgment of the Law thereupon, to the Court, of which 1 Instit. 226. kind of Verdict it is said, *Omnis Conclusio boni, & veri iudicii sequitur, ex bonis & veris premissis, & dictis Juratorum.* And as a Special Verdict may be found in Common Pleas, so may it also be found, in Pleas of the Crown, or Criminal Causes that concern life or member.

And it is to be observed, that the Court cannot refuse a Special Verdict, if it be pertinent to the matter in Issue. 1 Inst. 228. The Court cannot refuse it.

It hath been questioned, whether the Jury could find a Special Verdict, upon a special point in Issue, or no, as they might upon the general Issue. But this question hath been fully resolved in many of our Books, first in Plo. Com. 92. It is resolved, That the Jury may give a Special Verdict, and find the matter at large, en chescun issue en le monde, so that the matter found at large, tend only to the Issue joyned, and contain the certainty and verity thereof. lib. 9. 12. A special Verdict may be found upon any Issue, as upon an *absq; hoc, &c.*

And in 2 Inst. 425. upon Collection of
B b b 2 many

many Authors, it is said, That it hath been resolved, that in all Actions, real, personal, and mixt, and upon all Issues joyned, general or special, the Jury might find the special matter of fact, pertinent, and tending onely to the Issue joyned, and thereupon pray the discretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cases between party and party, but also in Pleas of the Crown, at the Kings Suit, which is a proof of the Common Law. And the Statute of Westminster the 2d cap. 30. is but an affirmative of the Common Law.

A Free-hold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

And as this special Verdict is the safest for the Jury, 1 Inst. 228. so in many Cases it is most advantageous to the party, and helps him where his own pleading cannot. As for example, saith Littleton, Sect. 366, 367, 368. Albeit a man cannot in any Action, plead a Condition, which toucheth and concerns a Freehold, without shewing writing of this; yet a man may be ayded, upon such a Condition, by the Verdict of 12 men, taken at large, in an Assize of Novel disseisin, or in any other Action, where the Justices will take the Verdict of 12 Jurors at large: As put the case, a man seized of certain Land in Fee; letteth the same Land to another, for term of life, without Deed; upon Condition to render to the Lessor, a certain Rent, and for default of payment, a Re-entry,

entry, &c. By force whereof the Lessor is seized as of Franchhold; and after, the Rent is behind, by which the Lessor entred into the Land, and after the Lessor arraign an Assize of Novel disseisin, of the Land against the Lessor, who pleads that he did no wrong, nor Disseisin. And upon this, an Assize is taken. In this case, the Recognitors of the Assize may say, and render to the Justices, their Verdict at large, upon the whole matter; as to say, that the Defendant was seized of the Land, in his Demesne as of Fee, and so seized, let the same Land to the Plaintiff, for term of his life, rendering to the Lessor such a yearly Rent payable at such a Feast, &c. Upon such Condition, that if the Rent were behind at any such Feast, at which it ought to be paid, then it should be lawful for the Lessor to enter, &c. By force of which Lease, the Plaintiff was seized in his Demesne, as of Franchhold, and that afterwards, the Rent was behind, at such a Feast, &c. By which the Lessor entred into the Land, upon the possession of the Lessor. And pray the discretion of the Justices, if this be a Disseisin done to the Plaintiff, or not. Then, for that it appeareth to the Justices, that this was no Disseisin to the Plaintiff, inasmuch, as the Entry of the Lessor was congeable on him, The Justices ought to give Judgment, that the Plaintiff shall not take any thing by his Writ of Assize, and so in such case, the Lessor shall be ayded,
and

and yet no Writing was ever made of the Condition : For as well as the Jurors may have Conulance of the Lease, they also as well may have Conulance of the Condition, which was declared and rehearsed upon the Lease.

In the same manner it is of a Feoffment in Fee, or a gift in tail, upon Condition, although no Writing were ever made of it. And as it is said of a Verdict at large, in an Assize, &c. In the same manner it is of a Wit of Entry, founded upon a Disseisin, and in all other Actions, where the Justices will take the Verdict at large, there where such Verdict at large is made, the manner of the whole Entry is put in Issue.

But in Assise of Kent it cannot be found to be upon Condition, unless they also find the Deed of the Condition.

So of a Confirmation in Fee to Lessee for years.

Per Hale Ch. Just. Guild-hall, Hill. 1671.

A Special Verdict may be found as to Damages in an Action of the Case : as the Case was there, viz. Pro Quer^r, and if so, &c. then such Damages; if so, &c. then Damages such; and he said, he had known it so done in Debt, and the Damages three ways.

Also

Also in such case, where the Enquest may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the case aforesaid, they may well say, that the Lessor did not disseize the Lessee, if they will, &c.

General Verdict.

The Jury may likewise find Estoppel, Estoppels. which cannot be pleaded, as in the 2d Report, fol. 4. it well appears, where one Goddard, Administrator of James Newton, brought an Action of debt against John Denton, upon an Obligation made to the Intestate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Intestate dyed before the Date of the Obligation, and so concluded, that the said Escrip, was not his Deed, upon which they were at Issue.

And the Jury found that the Defendant delivered it as his Deed 30 July, Anno 23. Eliz. and found the Tenor of the Deed in hæc verba, Noverint universi, &c. Dat. 4. Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23. Eliz. And that he dyed before the said date of the Obligation, and prayed consideration of the Court, if this was the Defendants Deed; And it was adjudged by Anderson, Chief Justice Windham, Periam, and Walmsley, that this was

Note, that a Deed may be pleaded to be delivered after the date, but not before, because it shall not be intended, written before the date, which may be after the date. 12 H. 6. 1.

was his Deed, And the Reason of the Judgment was, That although the Obligee, in pleading, cannot alledge the delivery before the date, as it is adjudged in 12 H. 6. 1. which case was affirmed to be good Law, because he is estopped to take an averment against any thing expressed in the Deed; yet the Jurors, who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth.

As in Wast supposed in A. to plead that A. is a hamlet in B. and not a Town of it self, admitteth the Wast, &c. 9 H. 6. 66. and the Jury cannot find no Wast, for that would be against the Record. Estoppel.

But if the Estoppel or Admittance, be within the same Record in which the Issue is joyned, upon which the Jurors give their Verdict, there they cannot find any thing against this, which the parties have affirmed, and admitted of Record, although it be not true; For the Court may give Judgement upon a thing confessed by the parties, and the Jurors are not to be charged with any such thing, but only with things in which the parties vary. Ib. li. 5. 30.

So Estoppels, which bind the Interest of the Land, as the taking of a Lease of a mans own Land, by Deed indented, and the like, being specially found by the Jury, the Court ought to judge, according to the special matter; for albeit, Estoppels regularly must be pleaded and relied upon, by apt conclusion, and the Jury is sworn ad veritatem dicend. yet

Cro. I.
part 110.
Lib. 4. 53.

yet when they find *veritatem facti*, they pursue well their Oath, and the Court ought to adjudge according to Law. So may the Jury find a Warrantie being given in Evidence, though it be not pleaded, because it bindeth the right, unless it be in a Writ of Right, when the Mife is joyned upon the mife right. ^{Warrantie not pleaded.}
 1 Inst. 227.

Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter uncertainly, or ambiguously, are insufficient and void, and no Judgment shall be given thereupon: As if an Executor plead Plene Administravit, and Issue is joyned thereon, and the Jury find that the Defendant hath Goods within his hands to be administrated, but find not to what value, this is an uncertainty, and therefore an insufficient Verdict. li. 9. 74.
 1 Inst. 227. ^{Uncertain Verdicts.}

It is the Office of the Jurors, to shew the verity of the fact, and leave the Judgment of the Law to the Court. And therefore upon an Indictment of Murder, *quod felonice per culsit, &c.* If the Jury find *per culsit tantum*, yet the Verdict is good, for the Judges of the Court are to resolve upon the special matter, whether it was felonice, and so Murder, or not. li. 9. 69. And if the Court adjudge it Murder, then the Jurors in the conclusion of their Verdict, find the Felon guilty ^{The Office of the Jury.}
 & c

guilty of the murder contained in the Indictment.

Verdict finding part of the Issue.

More 405.

A Verdict that finds part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tryed the whole Issue, wherewith they are charged; As if an Information of intrusion, be brought against one, for intruding into a Messuage, and 100 Acres of Land, upon the general Issue, the Jury find against the Defendant for the Land, but say nothing for the House, this is insufficient for the whole.

Finding more than the Issue.

But if the Jury give a Verdict of the whole Issue, and of more, &c. That which is more, is Surplusage, and shall not stay Judgment: for Utile per inutile non vitiatur, Leon. 1 part. 66. Bro. 1 part. 130. But necessary incidents required by Law, the Jury may find.

Where the Verdict ought to be of more than is in the Issue.

Yet in many Cases, (nay almost in all) the Jury ought to find more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Cost, because it is parcel of their Charge as a Consequent upon the Issue, though it be not part of the Issue in terminis. li. 10. 119.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff
two

two Dren, and warranted them to be sound; on not Guilty, the Jury found him Guilty as to one, and not Guilty to the other, and good; for that the Action was founded not on the Contract, but the Deceit. 3 Cro. 884. Gravenor and Mete.

In Debt the Plaintiff declares, that he had Judgment against Baron and Feme for a Debt of the Wives, dum sola, &c. that they were in Execution, and suffered to Escape, the Jury found the Husband only in Execution and Escaped, and Judgment for the Plaintiff. Roberts versus Herbert, Hill. 12. Car. 2. C. B.

So in Trespas against two, one comes, and pleads Not guilty, and is found guilty. In this case, the first Inquest shall assess damages for the whole Trespas, by both Defendants; and afterwards, the other comes, and pleads Not guilty, and is found guilty: The finding of Damages by the first Inquest, to which he was not party, shall bind him; and therefore if the Damages are outrageous, and excessive, the Defendant in the last Enquest, shall have an Attaint. li. 10. 119.

So in Trespas, Quare clausum fregit, if Issue be joyned upon a Feoffment, and the Jury give outrageous Damages, An Attaint lies; for the inquiry of Damages is conse-

quent and dependant upon the Issue, and parcel of their charge. Ibidem.

Damages by
the first In-
quest.

In the 11th Report, fo. 5. It was resolved, That in Trespals against two, where one comes and appears, &c. against whom the Plaintiff declares with a simul Cum, &c. who pleads and is found guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found guilty; The Defendant which pleaded last, shall be charged with the Damages tared by the first Inquest; for the Trespals which the Plaintiff had made joynr by his Writ, and Count, and done at one time, cannot be severed by the Jurors, if they find the Trespals to be done by all, at one and the same time as the Plaintiff declared.

Several Da-
mages.
Vide Devant
ca. 4.

So in the Trespals against divers Defendants, if they plead not guilty, or several Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot assess several Damages against the Defendants, because all is but one Trespals, and made joynr by the Plaintiff, by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, so that the act of one, is the act of all, of the same party being present. But in Trespals against two, if the Jurors find one guilty,

at

at one time, and the other at another time, there several Damages may be taken. But if the Plaintiff bring an Action of Trespals against two, and declare upon a several Trespals, his Action shall abate. And this is the diversity between the finding of the Jury, and the confession of the party.

And in Trespals, where the Defendants plead several Pleas, all tryable by one Jury, and they find generally for the Plaintiff, the Jurors cannot sever the Damages; if they do, their Verdict is vicious.

But in Trespals against two, where one appears, and pleads not guilty to a Declaration against him, with a simul Cum, &c. and afterwards the other appears, and pleads not guilty to a Declaration against him also, with a simul Cum, &c. Whereupon two Venire fac. issue out, and one Issue tried after the other, and several Damages assessed: in judgment of the Law, the several Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inquests. And this shall bind all, but fiat nisi una Executio.

It is a Maxim, That in every case where Damages, an Inquest is taken by the Misc of the parties, by the same Inquest shall damages be taken for all: And in Mich. 39 H. 6. fo. 1. In an Action

Writ of In-
quiry.

Action of Trespas against many, (who pleaded in Barr the Term before) and one of them made default, which was Recorded, There it is resolved by all the Court, That for saving of a Discontinuance, a Writ of Enquiry of Damages shall be awarded; but none shall issue out, because he shall be contributory to the damages taxed by the Inquest, at the Mise of the parties, if it be found for the Plaintiff; and if it be found against the Plaintiff, then the Writ of Enquiry shall issue forth.

And the Reason wherefore no Writ shall issue out at first, to inquire of damages until, &c. is, because that if a Writ should issue out, and be executed, this is nothing but an Inquest of Office, and not at the Mise of the parties, and yet this Inquiry (if it might be allowed) ought to serve for all the damages; For inquiry of damages, shall not be twice, and the others which have pleaded to Inquest, if the Issue be found against them, shall be chargeable to those damages which are found by the Inquest of Office, and if they be excessive, they shall have no remedy, although there be no default in them; for they cannot have an Attaint, because it is but an Inquest of Office.

Damages by
the first In-
quest.

But in Trespas against two, who plead not guilty, &c. severally; and several Venire fac. awarded. The Inquest which first passes, shall assess

assess damages for all, and the second Inquest ought not to assess damages at all, but that Defendant shall be contributory to the damages assessed by the first Jury, notwithstanding he is not party to it; yet if these damages be excessive, he shall have an Attaint, (because though he is a stranger to the Issue, yet in Law, he is privy in Charge.) And so no damage or mischief can accrue to him in this Case.

Now let us see, when something is left out of the Verdict which the Jury ought to have inquired of, whether it may be supplied by matter ex post facto; and how: And for this, know, that if damages be left out of a Verdict, this omission cannot be supplied, by Writ of Inquiry of damages: for this would prevent the Defendant of his Remedy by Attaint, which would be very mischievous; for then such omission might be on purpose, to deprive the Plaintiff of his Attaint, li. 10. 119.

Verdict, when to be supplied, by Writ of Inquiry, &c.

Vide hic. cap. 6.

And the Rule is, That when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies, There the omission of this, may be supplied by a Writ of Inquiry of damages; as in a Quare impedit, if the Jury omit to enquire of these 4 things, that is to say, de plenitudine, ex cujus presentatione, si tempus semestris transierit, and the value of the Church per annum, there the

the Plaintiff may have a *Writ* to inquire of these points. Dyer 241. 260. because of these no Attaint lies, as it is holden in 11 H. 4. 80. because that as to these, the Inquest is but of Office. But in all cases, where any point is omitted, whereof on Attaint lyeth, there this shall not be supplied by *Writ* of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury find Damages and Cost, and no value, as they ought, this shall not be supplied by *Writ* of Inquiry of damages, for the Reason aforesaid. Ib. Et sic in similibus.

Verdict set aside, because the damages not well assessed.

Release Damages.

Verdict set aside in part.

For insufficiency in the Declaration.

But how then? What, shall the Plaintiff loose the benefit of his Verdict, because the Jury assessed no damages, (or did insufficiently assess them)? Certes in such Cases where damages only are to be recovered, he must loose the whole benefit of his Verdict; but where any thing else is to be recovered, besides damages, as in Debt, Ejectment, &c. he may release his damages, and have Judgment upon his Verdict as to the rest. And so where damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgment for those damages well assessed. And oftentimes the insufficiency of the Declaration shall set aside the Verdict; as if an Action upon the Case be brought upon two promises, and one of them be insufficiently laid, and the Verdict give intire damages; this is naught for the whole;

whole; But if the Damages had been severally assessed upon the several promises, then the Verdict as to the promise well laid, should have stood.

In the 11th Report, fo. 56. Marsh brought a Writ of Annuity against Bencham, and the parties descended to issue, which was tryed for the Plaintiff, and the Arrerages found, &c. But the Jurors did not assess any damages, or Cost; which Verdict was insufficient, and could not be supplied by Writ of Inquiry of damages: wherefore the Plaintiff released his damages and costs, and upon this had Judgment: upon which the Defendant brought a Writ of Error, and assigned the Error aforesaid, scil. the insufficiency of the Verdict; sed Judicium affirmatur, because the Plaintiff had released his damages and costs, which is for the benefit of the Defendant.

Release of damages where none were assessed.

In Detinue of Charters, or non detinet, Verdict for the Plaintiff, and Damages, but the Jury did not find the value of the Deds, and a Writ of Inquiry was awarded to that purpose and returned, and ruled good; and by Twisden Just. Debt against Executor who pleads plene, &c. and it's found against him, and the Jury give no damages, that can't be aided by Writ of Inquiry. Burton versus Robinson. Pasch. 17 Car. 2. B. R.

Release of damages where they were not well assessed.

In Dyer 22 Eliz. 369. 370. In a Writ of Ejection Custodia terre & heredis, the Jurors assessed damages intirely, which was insufficient; for it lay not for the Heir, yet the Plaintiff released his damages, and had Judgment for the Land: And Note, that insufficient assessment of damages, and no assessing, is all one.

Damages and Costs.

The Jury ought to assess no more damages pro injuria facta, than the Plaintiff declares for: But they may assess so much, and moreover give cost, which is called *Expensa litis*; though in the proper and general signification. *Damnum*, also comprehends Costs of Suit, as the Entry reciting both damages and costs, well affirms, scil. *Quæ dampna intoto se attingunt cum, &c.*

More damages than the Plaintiff declares for.

But if the Jury do assess more damages than the Plaintiff declares for, the Plaintiff may remit the overplus, and pray Judgment for the residue, as in the 10th Report, fol. 115. in *Trespas* the Plaintiff declared ad *dampnum, &c.* 40 l. at the tryal the Jury assessed damages occasione transgressionis pr dict. ad 49 l. and for costs of Suit 20 s. upon which Verdict the Plaintiff at the day in Bank, remitted 9 l. parcel of the said 49 l. assessed for damages, and prayed Judgment for 40 l. (to which damage he had counted) with increase of costs of suit, and had 9 l. de Incremento, added by the Court, which in all amounted

Damages remitted.

amounted to 50 l. and had his Judgment accordingly: upon which, a Writ of Error was brought, and the Judgment affirmed.

For as in real Actions the Demandant shall not count to Damages, &c. because it is uncertain to what sum the damages will amount, by reason he is to recover damages pendant le briefe also in the case of Costs, he shall recover for the expences depending the suit, which being uncertain, cannot be comprehended in the Count; because the Count extends to damages past, and not to expences of Suit. For in personal Actions, he counts to damages, because he shall recover damages only for the wrong done, before the Writ brought, and shall not recover damages for any thing, pendant le briefe. But in real Actions, the Demandant never counts to damages, because he is to recover damages also, pendant le briefe, which are uncertain.

Damages in real and personal Actions.

The Jury may if they will, assess the damages and costs intirely together, without making any distinction, 18 E. 4. 23. But then they must not assess more damages and costs, than the damages are, which the Plaintiff counts to; for if they do, the Plaintiff shall recover only so much as he hath declared for, without any increase of cost, because the Court cannot distinguish how much they intended for cost, and how much for damages.

Damages and Costs intirely assessed.

D d d 2

As

As in 13 H. 7. 16. 17. One Darrel brought a Writ of Trespass, and counted to his damage 20 marks; the Defendant pleaded not guilty, and the Jury taxed the damages and costs of suit jointly to 22 marks; and the Verdict was held to be good for 20 marks, and hold for the residue; because it doth not appear how much was intended for damages, and how much for costs; so that there may be more damages than the Plaintiff declared for, or less; and so the Court knows not how to increase the cost; wherefore he shall have Judgment but for 20 marks, by reason of the incertainty.

Verdict amended by the Notes.

Where a special Verdict is not entered according to the Notes, the Record may be amended, and made agree with the Notes at any time, though it be 3, or 4, &c. Terms after it is entered. lib. 4. 52. lib. 8. 162. Cro. 1 part. 145.

In the Case of Turnor and Thalgate, Mich. 1658. B. R. It was said per Cur. That special Verdicts may be amended by the Notes, but the Notes cannot be amended or enlarged by any Averment or Affidavit; for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, that the Judgment, &c. was vacated pro ut per Rule, the Verdict was amended, vacated per Cur. pro ut per Rule; for so is implied in the Notes.

See a Verdict amended by the Notes after Judgment and Error brought, Rolls. 1 part. Reports. 82.

If the matter, and substance of the Issue be found, it is sufficient; for precise forms are not required by Law in special Verdicts, (which are the finding of Lay-men) as in Pleadings, which are made by men learned in the Law; and therefore intendment in many Cases shall help a special Verdict, as much as a Testament, Arbitrament, &c. Any therefore he which makes a Deputy, ought to do it by Escript; but when the Jury find generally, that A. was Deputy to B. all necessary incidents are found by this; and upon the matter they find, that he was made Deputy by Deed, because it doth tantamount. lib. 9. 51. And in the 5th Report, Goodale's Case. It was resolved, That all matters in a special Verdict, shall be intended, and supplied, but only that which the Jury refer to the Consideration of the Court.

Form.
Hob. 54.

In all Cases where the Jury find the matter committed to their charge, at large, and over more conclude against Law, the Verdict is good, and the conclusion ill. li. 4. 42. and the Judges of the Law will give Judgment upon the special matter, according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law, li. 11. 10. Vide De-
viant.

Ill conclusion,

More 105.
269.

Where

As general as
the Narr.

Where the Declaration in Wrespals is
Cum aliquibus averiis, of a number uncertain,
and the Verdict is as general as the Decla-
ration, cum aliquibus averiis, there the Ver-
dict is good. Cro. 2. part. 552.

In Ejectione firme, where the Plaintiff de-
clared of a Messuage, and 300 Acres of Pa-
sture in D. per nomina, of the Manors of
Monkham, and five Clofes per nomina, &c.
upon Not guilty, the Jury gave a special Ver-
dict, viz. quoad four Clofes of Pasture, con-
taining by Estimation 1000 Acres of Pa-
sture, that the Defendant was Not guilty;
Quoad residuum, they found matter in Law;
And it was moved by Yelverton, That this
Verdict was imperfect in all; For when the
Jury find that the Defendant was Not guilty
of four Clofes of Pasture, containing by esti-
mation, 2000 Acres of Pasture, it is incer-
tain, and doth not appear of how much they
acquit him. And then, when they find quoad
residuum the special matters, it is uncertain
what that Residue is, so there cannot be any
Judgment given; and of that Opinion was
all the Court, wherefore they awarded a
Venire facias de novo, to try that Issue. Cro.
2. part. 13.

Quoad Resi-
dum, incer-
tain.

Quoad Resi-
dum.

Ejectione firme of 30 Acres of Land in D.
and S. The Defendant was found guilty of
10 Acres, and Quoad Residuum not guilty;
and it was moved in arrest of Judgment,
That

That it is uncertain in which of the Wills this Land lay : and therefore no Judgment can be given : sed non allocatur, and it was adjudged for the Plaintiff; for the Sheriff shall take his Information from the party for what ten Acres the Verdict was. Cro. last part. 465. diversitas apparet.

Where the Jury find Circumstances upon an Evidence given, to incite them to find fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2. part. 187. Yet in many Cases, the Jury may find Circumstances and presumptions, upon which the Court ought to judge : As to find that the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged that the Husband assented to the devise at first. More 192.

Where a Verdict is certainly given at the Trial, and uncertainly returned by the Clerk of the Assizes, &c. The Poslea may be amended; upon the Judges certifying the truth how the Verdict was given. Cro. 1. part. 338.

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for words, Thou wast perjured, and hast much to answer for it before God; Exception after Verdict for the Plaintiff, in arrest of Judgment : For that it is not laid in the Declaration,

Ill Plea, made good by Verdict.

ration, that he spake the words in auditu complurimorum; or of any one, according to the usual form: sed non allocatur; for being found by the Verdict that he spake them, it is not material, although he doth not say, in auditu plurimorum; whereupon it was adjudged for the Plaintiff. Cro. 1. part. 199.

See Cro. last part. 116. Where the Barr was ill; because no place of payment was alledged; yet the payment being found by Verdict, it was adjudged well enough; for a payment in one place, is a payment in all places.

Trespals by Baron and feme de clauso fracto, of the Barons. And for the battery of the feme, ad dampnum ipsorum, the Defendant, Quoad the Clausum fregit, pleaded Not guilty, Quoad the Battery justifies. And for the first Issue, it was found for the Defendant: And for the second, for the Plaintiff, and now moved in arrest of Judgment, that the Declaration is not good, because the
 Baron & Feme. Baron joyns the feme with him in Trespals de clauso fracto of the Barons, which ought not to be; But for the Battery of the feme; they may joyn, whereto all the Court agreed; But it was moved, That in regard it was found against the Plaintiffs for this Issue, in which they ought not to joyn, and the Defendant is thereof acquitted, and the Issue is found against the Defendant, for
 that

that part wherein they ought to soyn : This Verdict hath discharged the Declaration for that part which is ill, and is good for the residue. As in 9 E. 4. 51. Trespals by Baron and Feme, for the Battery of both : The Defendant pleaded Not guilty, and found guilty, and damages assessed for the Battery of the Baron, by its self, and for the Battery of the Feme by its self, and Judgment was given for the damages for the battery of the feme, and the Writ abated for the residue. (And of that Opinion was Lea, Chief Justice, and Doderidge al. contra.) And the same Law I conceive, if the Jury had found the Defendant Not guilty of the battery to the *Palmer's Re-* Husband, but guilty to the Wife. Cro. 2. ports, 338. part. 655.

Rochel and his Wife, brought an Action of Trespals and Assault in the Exchequer, *Rochel and his* Hill. 1659. against Steel, and others, who *Wife against* pleaded Not guilty, and the Verdict found *Steel.* Steel guilty of the Battery to the Wife; but found nothing concerning the Husband. Wherefore Judgment was stayd; but the Barons held, That if the Jury had found the Defendants not guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the Damages, for the Battery of the Wife.

The Jury may find any thing that may be Of what a Ver-
 C & c given dict may be.

Plo. Com. 411.

giben in Evidence to them, as Records, either Patent, Statute or Judgment. Things done in another County, or Country, for which see Evidence before. Hob. 227. And of those things they ought to have Conu-
 sance, they are to have Conu-
 sance also, of
 all Incidents, and dependants thereupon;
 for an Incident is a thing necessarily depend-
 ing upon another. Co. Littleton 227. b.

Incidents.

How constru-
ed.

If the Verdict may by any ways be con-
 strued good, a construction to destroy it, ought
 not to be made.

Outlaw.

If one of the Jury be Outlawed when the
 Verdict is found, the Verdict is not good, but
 may be reversed by Error.

In a special Verdict the case in Fact must
 be found clear to a Common intent without
 Equivocation. Vaughan's Reports 78.

Contents of a
Deed.

If the Jury collect the Contents of a
 Deed, and also find the Dæd in hæc verba,
 the Court is not to Judge upon their Collec-
 tion, but upon the Dæd it self. The Jury
 may find the Contents of a Dæd or Will
 proved by Witnesses, Ibidem.

Common.

Trespals for disturbing him of his Com-
 mon belonging to 100 Acres, and the Jury
 find Common for 50. this is for the Plain-
 tiff; otherwise upon an Avoury, or Quod
 permittat,

permittat, which are founded upon the right, but the Trespass is for Damages. Palmer's Rep. 289.

If the matter and substance of the Issue be found, it is sufficient, though it be against the Letter of the Issue. As in the first, Institutes, fo. 114. b. A Modus decimandi was alledged by prescription, time out of mind, for Tythes of Lambs: And thereupon Issue joyned. And the Jury found, that before twenty years then last past, there was such a prescription, and that for these twenty years, he had payd Tythe Lamb in specie. And it was objected first, That the Issue was found against the Plaintiff, for that the prescription was general for all the time of the prescription, and 20 years fail thereof. 2. That the party by payment of Tythes in specie, had waved the prescription, or custom. But it was adjudged for the Plaintiff; for albeit, the modus decimandi had not been paid by the space of twenty years, yet the prescription being found, the substance of the Issue is found for the Plaintiff.

The Verdict may be against the Letter of the Issue, so the substance is found.

Prescription.

In Assise of Darrein Presentment, if the Plaintiff alledge the avoydance of the Church by privation, and the Jury find the voydance by death, the Plaintiff shall have Judgment; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1 Instit. 282.

Avoydance.

Deprivation.

If a Gardein of an Hospital bring an Af-
fise against the Ordinary, he pleadeth that
in his Visitation he deprived him as Ordina-
ry, whereupon Issue is taken, and it is found
that he deprived him as Patron, the Ordina-
ry shall have judgment, for the deprivation
is the substance of the matter. Ib.

Breach of 20
Trees cut
down for 10.

The Lessee Covenants with the Lessor,
not to cut down any Trees, &c. and binds
himself in a Bond of 40 pounds, for the per-
formance of Covenants. The Lessee cut
down 10 Trees, the Lessor bringeth an Ac-
tion of Debt upon the Bond, and assigneth
a breach, that the Lessee cut down 20 Trees:
whereupon Issue is joyned, and the Jury find
that the Lessee cut down ten: Judgment shall
be given for the Plaintiff, for sufficient matter
of Issue is found for the Plaintiff, to forfeit
the Bond. Ib.

Indictment of
Murder, and
Verdict finds
Manslaughter.

And this Rule holds in Criminal Causes:
For if A. be appealed, or indicted of Mur-
der, viz. that he of malice premeditated killed J.
A. pleadeth that he is not guilty *Modo & for-*
ma, yet the Jury may find the Defendant
guilty of Manslaughter without malice pre-
meditated, because the killing of J. is the mat-
ter, and malice premeditated is but a Circum-
stance. *Plo. Com. 101.*

Modo & forma.

And generally where *modo & forma*, are
not of the substance of the Issue, but words of
form;

form; there it sufficeth, though the Verdict doth not find the precise Issue.

As if a man bring a Writ of Entry in casu proviso, of the Alienation made by the Tenant in Dower to his disinherittance, and counteth of the Alienation made in Fee, and the Tenant saith, that he did not Alién in Manner, as the Demandant hath declared, and upon this they are at Issue, and it is found by Verdict, that the Tenant aliéned in tail, or for term of another mans life. The Demandant shall recover, yet the Alienation was not in manner as the Demandant hath declared, Littleton, Sect. 483. Alienation.

Also if there be Lord, and Tenant, and the Tenant hold of the Lord by fealty only, and the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespass against his Lord, for his Cattel so taken, and the Lord plead that the Tenant holds of him by fealty and certain Rent, and for that Rent behind he came to distrain, &c. And demand Judgment of the Writ brought against him Quare vi & armis, &c. And the other saith, That he doth not hold of him, in manner as he supposed; and upon this, they are at Issue. And it is found by Verdict, that he holdeth of him by fealty only, in this case the Writ shall abate, and yet he doth not hold of him, in manner as the Lord hath said; For the matter of the Issue is, Whether

Trespass by the Tenant against the Lord.

ther the Tenant holdeth of him or no ; for if he holdeth of him, although that the Lord distrain, the Tenant for other services which he ought not to have, yet such *Writ* of Trespas, Quare vi & armis, &c. doth not lye against the Lord, but shall abate. Littleton, Sect. 485.

The Verdict may find the Defendant guilty of the Trespas at another day or place.

Also in a *Writ* of Trespas for Battery, or for Goods carried away, if the Defendant plead not guilty, in manner as the Plaintiff suppose, and it is found that the Defendant is guilty in another Town, or at another day, then the Plaintiff suppose, yet he shall recover.

Conspiracy.

So the Jury may find the Conspiracy at another day, for the day is but form.

Battery.

In Battery if the Defendant justifie at another day with a Traverse Devant & apres, he may be found guilty at another day.

Son assault Demesn.

If the Defendant by this Plea agree with the Plaintiff in the day, year, and place, and the Plaintiff reply, De son tort demesn sans ries cause, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another day. Rolls, tit. Tryal. 687. Vide devant. cap. 11.

And so in many other cases these words,
scil.

scil. in manner as the Demandant or the Plaintiff hath supposed, do not make any matter of substance of the Issue. Littleton. S. Ct 485.

And 'tis a Rule, That where the Issue taken, goeth to the point of the ~~Writ~~ or Action, there Modo & forma are but words of form, as in the cases aforesaid.

Modo & forma,
when words of
form.

But when a Collateral point in pleading is traversed, as if a Feoffment be alledged by two, and this is traversed Modo & forma; And it is found the Feoffment of one, there Modo & forma, is material; So if a Feoffment be pleaded by Deed, and it is traversed Absque hoc quod feoffavit, Modo & forma, upon this Collateral issue, Modo & forma are so essential, as the Jury cannot find a Feoffment without Deed. Co. Littleton, 282.

When of substance, & must be found by the Verdict.

So in non assumpsit modo & forma, upon an indebitatus assumpsit, there modo & forma, were not material. Secus, when the Action is upon a Collateral promise.

But here is a diversity to be observed, That albeit the Issue be upon a Collateral point, yet if by the finding of part of the Issue, it shall appear to the Court, that no such Action lyeth for the Plaintiff, no more than if the whole had been found, there Modo & forma, are but words of form, as in the aforesaid case of the Lord and Tenant, it plainly appears; for it was all one, whether the Tenant held by fealty only, or by fealty and Kent, because if either was true, the Tenant

Trespas Quare vi & armis, lies not against the Lord for distraining his Tenant, without cause.

nant could have no Trespas, Quare vi & armis, against the Lord in that case, by the Statute of Marlbridge. cap. 3. Vide hic Devant.

Jury cannot
Vary from
their Verdict,
when it is re-
corded.

After the Verdict recorded, the Jury cannot vary from it, but before it is recorded, they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plo. Com. 212.

Open Verdict
and privy Ver-
dict.

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret, and privy from each of the parties, before it be affirmed in Court.

The Jury may
vary from a
private Ver-
dict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying shall

shall not be their Verdict, till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be non-suited: But when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then non-suited, but he may be non-suited, when the Verdict of right ought to be rendered. Ergo, the force is in the giving of the Verdict in the Court, and not elsewhere.

And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or it be not full in Law, or for some other reasonable cause immediately perceived. Therefore if they may vary, and contradict their first Verdict given in open Court. A fortiori upon better advisement, they may do so when their first Verdict was given out of Court, and they not discharged; for they be in the Custody of the Bailly, till they be discharged in Court. Plow. Com. 211. More 33.

Bro. tit. Verdict. 12.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in case of Mistake, when the party is to recover by view of the Jurors). But there must be a Venire facias de novo. Cro. 2. part. 210.

Jury shall give but one Verdict in the same cause.

If a Verdict be good in part, and naught in another part, it shall stand in part, and a new Verdict good in part.

F. F. F.

new

new Inquest shall be for the rest. Bro. tir. Verdict. 89.

What permitted in Pleading for the Juries direction in their Verdict.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtful in Law; for, a Traverse (for this Reason) may be omitted. As in debt against an Executor, It is a good plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor; for the lay people know no difference, between one administering as Executor, and one administering as Administrator, 9 E. 4. 33.

A Special non est factum.

For this Reason likewise, the special matter may be pleaded together with the general Issue, &c. As that the Obligation put in suit, was sealed by him, and delivered to A. to keep till certain Indentures were made between the Plaintiff and him; before which Indentures made, the Plaintiff took the Obligation out of the possession of A. so is not his Debt. This is good, and yet by this general conclusion, the matter precedent shall not be waived, for it were perillous to put the special matter in the mouth of Lay people. 9 H. 6. 38.

*Where the Issue upon a collateral Matter is tryed in a foreign County, Hundred, &c. where the Principal and Accessary shall be tryed.

Damages. * In Trespass, if a Release be pleaded in a Foreign County, and tryed there for the Plaintiff, there also shall damages be assessed

assessed by the same Jury. For where the principal is tryed, there also shall the Accessary and incidents be inquired of. I need use no other instances to illustrate this, than the case abovesaid. 21 Aff. 14.

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of things in grant, they must also find the Dēd of the Condition. What things the Jury may find.

Upon Traverse of a Lease *Modo & forma*, the Jury may find a Lease of another date, although the date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the issue in matter and form. *Modo & forma.*

In an Assise of Rent, the Jury may find that the Rent was granted with an Atturment, although no Specialty be shewed. Rent.

A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record. Matter of Record.

They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law. Divorce.

Attainder of Felony not pleaded cannot be found, unless *Sub pede sigilli.* Attainder. 26 Aff. 2.

The Jury is not to inquire of this which is agreed by the parties.

Dower.

As in Dower, if the Tenant says he has been always ready to render Dower, and the issue be if the Husband dyed seised, the Jury is not to inquire, if the Estate was dowerable; for this is confessed.

Wast.

If the Defendant doth not deny the Wast, but Pleads another matter, scilicet nul tiel vill lou, &c. the Jury is not to inquire of the Wast, but give damages although no Wast be made.

Award.

In Debt upon a Bond, with a Condition to perform an Award, and the Defendant Plead Nullum fecit Arbitrium, and the Plaintiff reply, fecit Arbitrium, and sets it forth, and the Defendant rejoyn Nul tiel award, the Jury cannot find any matter dehors to make the Award void in Law, which doth not appear within the Award pleaded. As that the release awarded would discharge the Bond of the Submission, for nothing is in issue, but whether such an Award was made in fact as is alledged, neither could this matter be alledged by any Responder; for it would have been a departure from the Plea, and the Jury cannot find that which would have been a departure, because out of their issue. But in this Case, if the Defendant would have took advantage of it, he ought to have Pleaded all this matter in his

Farr,

Barre, and not have said Nullum fecit Arbitrium; for 'tis a departure in the Responder to acknowledge an Award which was denyed in the Plea.

In Debt for 20 s. and the Issue be, solvit ad diem, and the Verdict be quod debet the 20 s. this is not good, because it is not direct but by Argument. How the Jury ought to find their Verdict, and what shall be intended.

In Debt upon an Obligation, if the Defendant say, That he is a Lay-man not lettered, and 'twas read as an Acquittance, Et issint nient son fait, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, because they ought precisely to find if it was his Dæd or not. *Nient lettered.*

If the Issue be, whether where a Copyhold is granted to thre for the lives of two, if he which dye seised, &c. ought by Custom to pay a Heriot or not, and the Jury find that there was never any such Estate granted in the Mannor; this is not good for the reasons aforesaid. Custom.

So if the Issue be, if by Custom an Estate tayle may be granted, and the Jury find, that it may be granted in Fee; which is greater, yet 'tis not good.

In Trespass for taking and cutting his Leather, Trespass.

Heather, if the Defendant justifie as a Searcher, and cut it for the better search More scrutatorum, without any other damage; and the Plaintiff reply, De injuria sua propria Absq; hoc, that he cut it, More scrutatorum, upon which Traverse, issue is joyned, and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, because 'tis not any answer to the issue, but by Argument.

Battery.

In Trespass and Battery in A. to find not guilty in A. is not good; for it ought to be generally not guilty.

Riens per Descent.

Uncertain.

Upon this Plea, if the Plaintiff reply that he hath divers Lands in D. per descent, and the Jury find he had divers Lands by descent, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Ejectment.

Of 5 Acres, if they find the Defendant guilty in 8 pieces. de terre parcel tenementorum predict, 'tis a void Verdict because uncertain, and no Execution can be made of peices.

Verdict Special.

In case upon non Assumpsit Pleaded, if the Jury find that the Defendant non Assumpsit; yet if two Witnesses say true, then we find that he did Assume. The first shall stand for the Defendant; and the last words
are

are void; and Surplufage fhall not vitiate. Surplufage.

If upon a Lease of 20 Acres, and the Defendant plead Non dimisit, and the Jury find quod dimisit 10 Acres tantum, and the Conclusion of the Verdict is, Et si, super totam materiam Curiae videbitur quod Defendant dimisit 20 Acres, then they find for the Plaintiff; and if not, then for the Defendant; this is repugnant, and so the Verdict is void in all. Ejectment.

To Assess Damages, uncertainty is void. Certain.
As to say we Assess 40 l. if we must by Law, if not then but 3 l. this is void.

Indelictatus assumpsit, to Assess Damages occasione debiti predicti is good, although it ought to be occasione non performanceis, &c.

In an Information upon the Statute 39 El. ca. 11. for Dying with Logwood, by which he lost 20 l. for every Offence upon Not guilty, if the Jury find him Guilty for using this against the Statute for 40 days, by which he lost this is not good, because he forfeits 20 l. for every time, and the number of times do not appear. Information.

If the Jury find the words in the Will, and yet do not find the Will, the Verdict is not good.

If they first find the Special Matter, and then find the Issue generally, the Special Matter is hereby waived.

Where a Special Verdict shall be good by Intendment.

If the Jury find that J. S. was seised in Fee, and Devised the Land to J. D. although they do not find that the Land was held in Socage, yet this is good; for this shall be intended, this being a Collateral thing, and this being the most common Tenure.

Will.

If they find that he was seised and made his Will in hæc verba, &c. although they do not find that he Devised the Land as in the former; yet this is good by intendment.

But if a thing is left out, and cannot be intended, the Verdict is not good.

If the Issue be whether the Sheriff took J. S. and kept him in Prison in Execution for certain Debt and Damages by force of a Cap. ad Sa. and the Jury find that he took him by force of an alias Cap. ad Sa, &c. although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue, yet this is a good Special Verdict; for it shall be intended, for the Consequence is necessary from this which is found, for he could not take him, but that he must be in Execution. Vide several instances of this. Roll. tit. Tryal. 697, &c.

If

If the Jury find that J. S. was seised in Fee, and made his Will in hæc verba, and that he afterwards died; although they do not find that he died seised, yet it shall be intended that he died seised; and so good. Will.

If they find that A. did Bargain and Sell, &c. although they do not find any consideration, yet this shall be intended. Bargain and Sale.

So if they find that such persons Authori- Letters Pa-
zati virtute literarum patentium dominæ Elizabethæ, &c. and do not find that the Letters Patents were under the Great Seal, yet this shall be intended. tents.

Verdicts of Lay-men shall be taken according to their intent, and need not so precise a form as in Pleadings, lib. 4. 65. Hob. 76.

Therefore if the Jury find a Recognizance in nature of a Statute Staple in this manner, That the Conusor came before R. O. Recorder of London, and T. O. Mayor of the Staple, Et recognovit se debere to B. 200 l. and do not say, Secundum formam statuti, &c. nor Prescriptum Obligatorium, &c. although the Statute of 23 H. 8. provide, That it shall be by Bill Obligatory, sealed with three seals; and here it doth not appear, that there was any Bond or Seal, nor that it was according to the Statute; yet these things shall be intended, they having found a Recognizance

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cognizance before the Mayor and Recorder.

Notes.

A Special Verdict may be amended by the Notes.

Where a special Conclusion of a special Verdict shall aid the Imperfections of it.

If the Jury find a Special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any title for the Defendant, which is a Collateral thing to the point which they refer to the Court, yet the Verdict is good enough, for all other things shall be intended, except this which is referred to the Court, lib. 5. 97.

In Ejectment, If the Plaintiff declare upon a Lease made by A. and the Jury find a Special Verdict, and Matter in Law upon a power of Revocation of Uses by an Indenture and limitation of new Uses, and then a Lease for years made to the Plaintiff by the Lessor in the Declaration, and another, in which there is an apparent Variance; but they conclude the Verdict, and refer to the Court, whether the grant of a new Estate found in the Verdict be a revocation of the first Indenture, or not. The special Conclusion shall aid the Verdict, so that the Court cannot take notice of the variance between the Lease in the Declaration and Verdict, because the doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the first Indenture, and not of the former

former Uses, and limitation of new Uses, as it ought to be ; yet in a Verdict this is good, for their intencion appears.

So Note a difference between a Special Conclusion and Reference to the Court, and a general Conclusion and Reference to the Court. Vide hic apres.

In Debt for 40 s. for a Horse sold, and the Jury find 40 s. Debt for two Horses sold; this is found against the Plaintiff, for this is not the same Contract. For whom the Verdict shall be said to be found.

So in Debt for 20 l. if the Jury find 40 l. Debt, this is against the Plaintiff.

In Debt for 20 l. for Wood sold, and the Jury find the Bargain was for 20 Marks; the Plaintiff shall not have Judgment for this Variance.

So in Debt for Rent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall not have Judgment.

But in Debt for 24 l. 8 s. received for the Plaintiffs use, if the Jury find the Defendant owes 24 l. but not the 8 s. the Plaintiff shall have Judgment ; for perhaps he had paid the 8 s.

In an Action upon the Case against A. if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain Days, that any one of them may be charged for the whole by himself, and then shews the Accompt of A. and B. who were found in Arrear, in so much, &c. and promised to pay this at certain days, but paid it not, and now he brings his Action against A. although upon non Assumpsit pleaded, it be found that the days of payment are mistaken, yet the days being past, the Action lyes, because the Law makes the Duty upon the Accompt; for which after the days an Action lyes.

Damages.

Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity.

Detinue.

In Detinue of a Bond of 100 l. if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant.

Promise.

So in a promise to do two things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment.

Otherwise in Ejectment upon a Demise of 10 Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment.

It

If the Issue be upon a Prescription, for Prescription.
Common belonging to a Messuage, and 200
Acres of Land, 50 of Meadow, and 50 of
Pasture; if the Jury find Common belonging
to the House 20 Acres of Meadow, and 20 of
Pasture in two of the Mills, and not in the
rest; the Prescription is not found.

If part of the Trespals or wrong be found Trespals.
'tis sufficient, in Trespals or an Action of Case.
the Case upon a Tort; as by a Commoner
for putting and depasturing Cattel in the
Common.

If the Issue be whether all the Lands in Audita Qua-
Execution, were the Estate of the Father in rela.
Tail, or in Fee, and part is found in Tail,
and part in Fee; Judgment shall be given
for the Defendant who pleaded the Seisin
in Fee.

If the Plaintiff declares upon a Demise Ejectment.
made the first of May to Commence at Mi-
chaelmas next, if the Jury find a Lease made
at any other day before the Feast, 'tis found
for the Plaintiff; for the day of making is
not material.

Otherwise of a Lease for years An Posses-
sion; As of a Lease made the 5th of May
Habend for three years from Lady-day be-
fore; and the Jury find a Lease made the
15th day of May for three years, from the
same

same Lady-day; for this is a Lease in Possession.

Imprisonment.

In false Imprisonment in Middlesex, and the Defendant justifie in London, to which the Plaintiff saith, the Defendant took him in Middlesex de son Tort demesne, and Issue upon this, and the Jury find the Defendant took him in Middlesex lawfully upon a Writ, yet this is for the Plaintiff; for the Issue is upon the place, and not upon the Tort, for that is confessed by the Pleading, if the taking was in Middlesex.

Debt.

In Debt for 20 l. and the Jury find 40 l. the Plaintiff shall not have Judgment, the reason seems to be because it cannot be the same Debt which is intire; but upon another Contract, which is mislaid.

Audita Querela.

If the Issue be Payment after Execution, and the Jury find payment before, yet the Issue is proved; for payment before, is payment after.

Obligation.

In Debt upon a Bond bearing date the 25 of June upon Non est factum, if the Jury find it his Deed, but that it was delivered 8 days after the date, this is found for the Plaintiff.

Joynt and several.

If the Issue be that two made the Feoffment, or two were Churchwardens, &c. and the Jury find but one, &c. the Issue is not found.

If the breach of Covenant or Waste be assigned in cutting 20 Trees, and the Jury find but 10; yet the Plaintiff shall have Judgment.

Obligation.
Covenant.
Waste.

If in Replevin, &c. the Jury find that part of the Cattel were Levant and Couchant, and part not, and the Issue is upon all, the Issue is not found.

Tatum & Pays.

In Ejectment for him who pleaded all, of 14 Acres, and the Jury find guilty of 20, the Plaintiff shall have Judgment for the 14, and the Verdict is void for the residue.

Ejectment.
Void in part.

In an Information upon an usurious Contract by two, 'tis not sufficient to find a Contract by one. Otherwise where the Tort and offence is several, as against two upon the Statute 4 E. 6. Pro emptione butiri, and selling it by Retail, &c. and so in an Action upon the Case in Nature of Conspiracy, and for words laid twice in one Declaration. This will put in Issue the manner as well as the matter, where the manner is material; as the time of the Fact, and other Circumstances.

Information:
Usury.

Modo & forma.

The Plaintiff replies, That W. made a Replevin Lease to him 30 Martii Habend. from Lady-day last, and Issue Modo & forma, and the Jury find a Lease made the 25 Martii, Habendum, Extunc for a year, this is good, although

Lease.

although the time of making, and Commencement of the Lease are mistaken, inasmuch as Extunc includes the Feast. Yet because a sufficient Title and Lease is found for the Plaintiff to put in his Cattel, this is sufficient, this being the substance, and the Modo & forma shall not put the Circumstances in Issue.

So in Trespass, if the Defendant justifie the putting in his Cattel for Common which he Claims from Pentecost to a certain time every year, which is traversed Modo & forma, and the Jury find that he had Common in Vigilia Pentecostis in festo, and the day next to this, to the time, this is found for the Defendant.

But otherwise in these Cases is an Assise of Common, because there he ought to recover his Title.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff before the Rent was due, scilicet such a day which was after, and Issue upon the Entry Modo & forma, and the Jury find for the Defendant, he shall have Judgment, for the scilicet is void, and the Modo & forma go to the matter. See after.

Non est factum. In Debt upon a Bond, and the Defendant plead *Non est factum*, and the Jury find

And the Bond made jointly by another with the Defendant, the Plaintiff shall have Judgment; for the Defendant should have pleaded this.

If a Devise be pleaded Absolute, if the Devise. Jury find a Devise upon a Condition Precedent, 'tis not good.

In Debt against A. as Daughter and Heir to B. and the Defendant plead *Riens per Discent.* *Riens per Discent.* and the Jury find that B. was seised in Fee and dyed, having Issue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and dyed one hour after, this Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother who was last seised, and not to the Father, and so the Defendant had not the Land by Discent from the Father, but from the Brother, and yet this is Asses in her hands if it had been specially pleaded.

In a Writ of Error brought by him in remainder in Tail to reverse a Fine, if the Defendant plead in Barr of the Writ of Error a Common recovery by the Tenant in Tail, to which the Plaintiff replies, That at the time of the Recovery suffered, he himself was Tenant to the Præcipe, and so the Recovery void, Upon which Issue is joined, *Part.* and the Jury find that he was Tenant of *Part.*
h h h

part, but not of other part. This Issue is partly found for the Plaintiff, and partly for the Defendant, so the Court shall proceed to the Examination of the Error; for that whereof he was found no Tenant; but 'tis a good bar of the Writ of Error, for that whereof he is found Tenant to the Præcipe.

Promise.

In Assumpsit to pay Money upon request, and issue upon this, if the Jury find the Plaintiff promised to pay the Money, but do not say upon request, nor Modo & forma, 'tis not found for the Plaintiff.

If the Substance of the Issue be found, 'tis sufficient Manner.

In Ejectment of a Manner, if the Jury find that there were no Freeholders, and so 'tis no Manner in Law, yet being a Manner by Reputation, and so the Tenements pass by the Lease; Therefore this Verdict is found for him who pleads the Lease of the Manner, for the substance is, whether any thing was demised or not.

Goal.

In an Information of Extortion against the Gaoler of the Goal, a Prison of the Castle of Maidston; the Jury found there was no Castle, but that there was a Goal; this was for the Plaintiff, because Goal is the Substance.

Accompt.

If the Issue be whether the Defendant had Accompted before R. and W. Auditors assigned

assigned by the Plaintiff, and the Jury find an Accompt before R. only; the Issue is found for the Defendant; for the Accompt is the effect of the Issue. Vide Rolls tit. Trial. 707. &c.

If 11 agree, and the 12th will not, the Verdict of the 11 cannot be taken, but the Court may carry the Jurors with them in Carts until they are agreed. 41 Ass. 11. Jury agree.

A privy Verdict may be altered in open Court. Verdict altered.

In an Extendi fac. upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in substance; for it is a compleat Verdict by the delivery. So of Presentments, &c.

A Fine pleaded in Barr, and that after the death of A. scil. 1 August 3. Car. B. Father of the Plaintiff was alive, & in plena vita & remansit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five years after, and the Plaintiff replies, and takes Issue, quæ il non fuit & remansit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find quod non fuit & remansit infra hoc Regnum Angliæ, 1 August 3 Car. but that he was there 1 Maii 4. Car. and remained there a Month, Fine and Non-claim. *Modo & forma.*

Month, and refer to the Court Au suit & reman sit infra hoc Regnum modo & forma, &c. This Issue is found for the Defendant, for the matter and substance of the Plea is, whether he was within the Realm after the death of A. and five years before Entry or Claim per him or the Plaintiff; and modo & forma shall not make the day material. Roll. tit. Trial. 7¹³.

Judgment, Arrest, at what time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the return, the party may shew any thing in Arrest of Judgment; for Judgment is not compleat until the last Judgment. The first is but an Award, A man may plead any thing in Arrest of Judgment after a Verdict, which will make Error if the Judgment be given.

In Debt upon a simple Contract against an Executor, if he will not plead in Abatement, but other Matter which is found against him, he shall not afterwards alledge that he is not chargeable in Arrest of Judgment.

So in Debt against Executors upon Arrearages of Accompt, where they are not chargeable.

What may be alledged.

That which appears ill upon the same Record, but not a matter of Fact, which doth not appear upon the Record, because the parties cannot

cannot by the Issue. As that a Juroꝝ was challenged, and yet served on the Tales, for this cannot appear without alledging matter of Fact. Nor that the Defendants Attorney had no Warrant. But if there be any irregular or foul practice, this may be offered to set aside a Judgment.

If any thing be omitted in the Declaration, or if more be put into the Declaration than is found by the Jury; if it make a material Variance betwixt the Nar. and the Verdict, the Action shall abate. Variance between the Verdict and the Declaration.

These following are adjudged material Variances.

If the Declaration be for these words, Thou procuredst eight or Ten of thy Neighbours to Perjure themselves, and the Jury find that he said, Thou hast caused eight or 10, &c. for he might be a remote Cause, scilicet causa sine qua non, without Procurement. *Nar.* He is a Bankrupt. *Verdict.* He will be a Bankrupt within two days. *Nar.* He is a Thief. *Ver.* He stole a Horse. *Nar.* Thou art a Murderer. *Ver.* He is, &c. *Nar.* I know him to be a Thief. *Ver.* I think him to be a Thief. Words.

So it is a material Variance, if a special Promise be laid to be upon Request, and the Verdict find it without Request. So if the Promise. Decla

Declaration be upon a Lease, made by two, or by Baron and feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Lease, or that the two were Tenants in Common, and so several Leases, otherwise if they were Coparteners.

So in Case that the Testator was indebted to the Plaintiff in 55 l. and the Defendant being Administrator in consideration, &c. Promise to pay this upon non Assumpsit, if the Verdict find the Promise to be to pay 30 l. part of the 55 l.

Ejectment.

So in Ejectment, If the Nar. be of a Lease of three Acres, a Lease of a Poiety will not maintain the Nar.

Wast.

So in Wast, for Cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them.

Prescription.

A Prescription in modo decimandi, That every one who hath seven Lambs, or under seven, shall pay to the person ob. for every Lamb, and the Jury find that, and further, That if he had more than seven Lambs, he should pay a Lamb; and that the Parson should pay the Parishoner ob. This is not the same Prescription, but makes a Martance.

But

But if there be a Variance between the Verdict and the Nar. either by way of Surplus or Defect; but if this matter of Variance be not material in the extenuation of the Action or Damages, the Action shall lye notwithstanding the Variance.

These ensuing are adjudged not to be material.

Nar. Strong Thief. Verdict. Thief. Nar. I say, &c. Ver. I affirm, or I doubt not. Nar. The Plaintiff will do such a thing. Ver. I think in my Conscience he will, &c. Nar. Of a Lease by a Parson for five years; if he tam diu should be Parson & tam diu viveret. And the Verdict find the Lease to be for five years, if he tam diu viveret without the words, and should continue Parson; for the Law implyeth, That if he be deprived or resign, that the Lease Determines. Nar. He is a Murderer. Ver. He was a Murderer; for when he says, He is a Murderer, 'tis not intended, that he did the Act in presenti, but before. So in Trespasses or Actions upon Torts and wrongs which are several. If the Verdict find part, 'tis no material Variance; and the Plaintiff in these Cases shall have Judgment, Roll. tit. Tryal. 720.

A Jury of Middlesex was demanded in Enquest by the Common-Pleas, the first day of the Term, default, and

and some appeared, and some not; so that there was not a full Jury, and neither the Defendant, nor his Attorney did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default; and by the opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevium, and all the Justices said the course was so; for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be non-suited; and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant loses by his default.

Where an Inquest is taken by default, the Defendant shall lose his Challenges, and by 28 Ass. p. 42. tit. Enquest in Fitz. he shall lose his Evidences also. Bro: Enquest 10. quod non est lex.

When the Defendant may be condemned by default, and when an Enquest must be taken upon the default.

Det. The Defendant pleaded a Release, and the Plaintiff replied non est factum; and at the day of the Venire facias, the Defendant made default, and the Inquest was taken upon his default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; And yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide, folly in le Plaintiff. Bro. Ib. 5. But upon such Release, and default in Trespass, the Enquest shall be taken by default, and the Defendant shall not be condemned by default;

default, though the Plaintiff pray it, and the reason is, because the debt is certain, and the damages are incertain in Trespass, Bro. lb. 3.

And Finch, fo. 409. hath well collected out of Brook, That always in an Action of Trespass, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Accompt, and the rest which are for things in certainty, if the Issue be taken upon a matter in fact only, as payment, or that an Acquittance pleaded in Barr by the Defendant, was made by Dures, &c. The Inquest shall be taken by default, if the Defendant makes default; But in the last recited Actions of Debt, &c. If the Issue be upon the Acquittance it self, Release, or other matter in writing, the Plaintiff may pray Judgment upon the Defendants default, if he will; but if he do not pray it, the Jury shall be taken by default, as in an Action of Trespass.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have Conuzans of the fact. Plowd. Com. 86. Verdict without, or against testimony.

C A P. XIV.

How the Jury ought to demean themselves, whilst they consider of their Verdict; when they may eat and drink, when not; What Misdemeanor of theirs, will make the Verdict voyd; Evidence given them, when they are gone from the Barr, spoils their Verdict: For what the Court may fine them, and where the Justices may carry them in Carts, till they agree of their Verdict. An Amercement Afforded by the Jury.

Jurors ought
not to eat or
drink.

There is a Maxime, and an old Custom in the Law, that the Jury shall not eat, nor drink, after they be sworn, till they have given their Verdict, without the Assent and Licence of the Justices; and that is ordained by the Law, for eschewing of divers inconveniencies, that might follow thereupon; and that especially, if they should eat or drink, at the Costs of the parties; and therefore if they do so, it may be laid in Arrest of Judgment.

But

But with the assent of the Justices, they may both eat and drink; as if any of the Jurors fall sick, before they be agreed of their Verdict, so soon that he may not commune of the Verdict, then by the assent of the Justices, he may have meat or drink, and also such other things as be necessary for him; and his fellows also at their own costs, or at the indifferent costs of the parties, if they so agree, or by the assent of the Justices, may both eat or drink: and if the Case so happen, that the Jury can in no wise agree in their Verdict; as if one of the Jurors knoweth in his own Conscience, the thing to be false, which the other Jurors affirm to be true, and so he will not agree with them, in giving a false Verdict, and this appeareth to the Justices by Examination, the Justices may in such case, suffer the Jury to have both meat and drink for a time, to see whether they will agree. And if they will in no wise agree, the Justices may take such order in the matter, as shall seem to them by their discretion, to stand with reason and conscience, by awarding of a new Inquest, and by setting fine upon them, that they shall find in default, or other wise as they shall think best, by their discretion; like as they may do, if one of the Jury die before the Verdict, &c. D. and Student. 158.

For by assent of the parties they may eat and drink.

Br. Jurors.

New Inquest when the Jury cannot agree.

If the Jury after their Evidence given unto them at the Barr, do at their own Char-

Where, if the Jury eat or drink, it shall avoid the Verdict, and where only fineable.

ges eat or drink, either before or after they be agreed on their Verdict; it is finable, but it shall not avoid the Verdict: But if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it shall avoid the Verdict: But if it be given for the Defendant, it shall not avoid it; Et sic è converso. But if after they be agreed on their Verdict, they eat or drink at the charge of him, for whom they do pass, it shall not avoid the Verdict. 1 Inst. 228.

To give the Jury money, makes their Verdict void by two Justices. Leon. 1 part 18.

What delivered to the Jury after Evidence, shall avoid their Verdict.

If the Plaintiff after Evidence given, and the Jury departed from the Barr, or any for him, do deliver any Letter from the Plaintiff, to any of the Jury, concerning the matter in Issue, or any Evidence, or any eserowle touching the matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff; but not, if it be found for the Defendant, Et sic è converso. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, this shall not avoid their Verdict, albeit they should not have carried it with them. Ib.

By

By the Law of England, a Jury after their Evidence given upon the Issue, ought to be kept together, in some convenient place, without meat or drink, Fire or Candle, (which some Books call an Imprisonment) and without speech with any, unless it be the Bayliff, and with him only, if they be agreed. After they be agreed, they may in causes between party, and party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in Criminal cases of life or member, the Jury can give no privy Verdict, but they must give it openly in Court.

How the Jury ought to be kept by the Bayliff.

When they may eat and drink.

See *Smith's* Common-wealth. 74.

Where there can be no privy Verdict.

Neither can a Jury sworn and charged in case of life, or member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be nonsuit, for he is in Judgment of Law ever present in Court; but a common person may be nonsuit. And in Civil Actions, the Justices upon cause, may discharge the Jury. Br. Enquest. 68. 47. 39. &c.

Where the Jury cannot be discharged before Verdict.

The King cannot be nonsuit,

But this is against Common practice, and I have known, that after a Jury of Life and Death have been sworn and charg'd with Prisoners Arraigned, the Judge having been credibly

credibly Informed, That it was a Jury pack'd to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

In Hillary Term, Sexto H.8. Rotulo 358. It was alledged in Arrest of the Verdict at the Nisi prius, that the Jurors had eat and drunk. And upon Examination, it was found, that they had first agreed; and that returning to give their Verdict, they saw Rede Chief Justice in the way, going to see a fray, and they followed him, Et in veniendo viderunt cyplum, & inde biberunt. And for this, every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37.

Jurors fined.

Jurors at the Nisi prius, fined in bank, for eating Pears, and drinking Ale.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, That they were all agreed except one, who had eat a Pear, and drunk a draught of Ale, for which he would not agree; And at the Request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Oath of the Jurors Seperatim, and the Bayliff who kept them, and found true, the offender was committed, and afterwards found Surety for his Fine. Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in banco, &c. at which day a Fine of 20 s. was there assessed.

assessed. Et quoad Ball: Curia avifare vult.

In Trespas by Mounson against West. the Jury was charged, and Evidence given, and Jurors being retired into a House, for to consider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, seeing their delay, searched the Jurors, if they had any thing about them to eat; upon which search it was found, that some of them had Figs, and others Pippins, for which the next day, the matter was moved to the Court, and the Jurors were examined upon Oath: And two of them did confess, that they had eaten Figs before they had agreed of their Verdict, and three other of them confessed, that they had Pippins, but did not eat of them; and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and consideration had, and conference with the rest of the Judges, the Verdict was held to be good. Notwithstanding the said misdemeanor. Leon. 1. part 133.

Fined for having Figs and Pippins about them.

And see the Book of Entries, 251. The Jurors after they went from the Barr, and seiplos, of their Verdict to advise, Comed-runt quasdā species, scil. Raisins, Dates, &c.

Fined for eating Raisins and Dates.

at

at their own Costs, as well before, as after they were agreed of their Verdict. And the Jurors were committed to prison, but their Verdict was good, although the Verdict was given against the King.

Finable for having sweet-meats, &c. about them, though they do not eat them. See *Plo.*

Com. 519.

One fined, and imprisoned for having *Sugar-Candy* and *Liquorish* about him.

In Ejectione firme, it was found for the Defendant, three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, until they were searched, and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were finable for having of the Sweet-meats with them, for that is a very great misdemeanour. Godbolt 353.

Jurors carted.

40 A. 1. Placito 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The same Evidence given to the Jury, after they were gone from the Barr, spoils the Verdict.

The Jury were gone from the Barr, to confer of their Verdict, and one of the Witnesses before sworn on the Defendants part, was called by the Jurors, and he retired again his Evidence to them, and after they gave their Verdict for the Defendant. And complaint being made to the Judge of the Assizes of this misdemeanour, he examined the Enquest, who confessed all the matter, and that

that the Evidence was the same in effect, that was given before, Et non alia nec diversa. And this matter being returned by the Postea, the Opinion of the Court was, That the Verdict was not good, and a Venire facias de novo was awarded. Cro. last part, 189.

Trin. 1653. between Wells and Tayler, Copies of a Bill, Answer, and Depositions were proved, but not all read and delivered to the Jury, who carried them with them from the Barr, in a bundle, which they layd by them and did not look on; yet their Verdict at the Barr, was set aside for this Cause, and the Court would not regard their saying that they did not read them, for they might say that to save themselves; it being a fault to take any thing without the Courts knowledge.

If one of the parties say to the Jury after they are gone from the Barr, You are weak men, It is as clear of my side as the Nose in a man's face, This is new Evidence; for his affirmation may much perswade the Jury, and therefore shall quash the Verdict. If a party speak to them.

So if any thing be read to them, which they ought not to have with them, as a book of Depositions, some whereof were read in Evidence. Pratt's Case, 21 Jac.

Escrowle delivered to a Juror, before he was sworn, *Violates the Verdict.*

The Plaintiff delivered an Escrowle to a Juror impanelled, before he was sworn, who afterwards being sworn, and gone with the Jury from the Barr, to consider of the Verdict, shewed the same Escrowle to his Companions, who found for the Plaintiff. The Minister who kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the matter aforesaid, upon which Judgment was stayed; for after the Jury are sworn, they ought not to see, nor carry with them any other Evidence, but what was delivered to them by the Court: Afterwards the Plaintiff said, That the Escrowle proved the same Evidence, which was given to them at Barr by him; wherefore it was not so bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book delivered to the Jury, act of Court.

Pasche 38 Eliz. Inter Vicary & Farthing, at the Nisi prius. The Issue was about Non-age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the assent of parties, and afterwards, the other was delivered to the Jury out of the Court by the Solicitor of the Plaintiff, without the assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the Postea; The Question was, whether this should make the Verdict void or no, for the Justices differed in opinion, Popham and Gawdy, that it

it should not; Fenner and Clench, that it should; the Negative Justices gave these Reasons; That the Book was delivered in Evidence in the Court, and so the other party might answer to it, and that the Court had informed the Jury of the validity thereof, how far they were to believe it, with many other Reasons: But the Affirmative was urged, because there might be some matter in this Book, to induce them otherwise than was intended before, and because it was delivered on his part, for whom the Verdict passed, without the Courts assent; yet one Book (scil. Cro. last part 411.) tells us, Judgment was afterwards given for the Plaintiff; see More's Reports 452. The Books differ; for Cro. makes Clinch give his opinion for the Verdict. But More brings him on the other side, which I conceive is truest; and for my part, I know no reason, why foisting of Evidence to the Jury without the Court, should have any favour at all.

Consider the Reasons in the former cases.

In the Case of Taylor and Webb, Trin. 1653, B. R. Twisden moved to set aside a Verdict given at Barr, because that after Evidence when the Writings were delivered to the Jury, some Writings which were not sealed (and therefore ought not to be delivered to the Jury) were delivered by a stranger to the Jury.

Hales Counsel of the other side, produces an Affidavit of the Foreman's of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court in Evidence upon the Tryal, and Hales said, That if this should avoid the Verdict, then that would be in the power of any Stranget unknown, and against the mind of the parties to avoid any Verdict.

Roll. Ch Just. The Affidavit of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) parties, and have offended, and shall not be allowed by their own Oath to take off their offence, and it is the Duty of the Jury to look what Writings they receive before they go from the Barr; and if any such Paper be lay'd up among other Papers delivered to them by the Court, so soon as they have discovered it, they should call in the Tip-staff, who keeps them, and deliver it to him, and to testifie they made no use of it; and he said it would be dangerous to give the least way to the delivering of any Writings to a Jury.

And at another day Roll cited 11 H. 4. 18. the Plaintiff (before the Tryal) delivered a a breviare of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided, So
Mich,

Mich. 31 Eliz. C. B. Metcalfe and Dean, After the Jury were gone from the Barr, they sent for one of the Witnesses, and re-examined him, who gave the very same Evidence that he had before given in Court, yet the Verdict was avoided; and the reason of both is, a fear and jealousy that other matters might be given, &c.

37 Eliz. Farthing's Case, a Paper not under Seal, which was given in Evidence was delivered to the Jury, this did not avoid the Verdict, because here can be no such fear; and per Roll, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it shall not avoid the Verdict. And in the principal Case the Verdict was avoided.

Hill. 40 Eliz. Rot. 847. In Arrest of Judgment after Verdict, it was alledged, that a Juroz delivered to his Companions, an Escrowle for Evidence to them, which was not given in Evidence at the Tryal, and adjudged no cause to Arrest Judgment, unless it had been received from one of the parties, which did not appear. More 546. but otherwise, if it had been given by a party, and the Jury had found for him.

Escrowle from
one who was
no party.

In the Case of Duke and Ventres, Mich. 1656. B. R. tryed at Barr, one Mr. Beverly of Suff. a Barrister was returned of the Jury,

Jury, who (having been at a Tryal of the same Cause above 20 years before in the Cheq. and heard there great Evidence to make a Deed fraudulent, which was now the Contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court? The Court ordered him to come into Court, and deliver all his knowledge which he heard then proved (which Evidence was not now given, because the parties were dead) and so he did, being not sworn again, but only upon the Oath taken as a Jurymen.

And certainly, It is of dangerous Consequence, to receive a Verdict against Evidence given, on supposal that some of the Jury knew otherwise, or on private Information given by one Jurymen to the rest, where he can't be Cross-Examin'd; and let such Jurors beware of Attaint, but the best way is (as before) in open Court.

In a Writ of Error, the first Error assigned was, that Termino Trin. twelve Jurors, and no more, did appear: This Jury adjourn-
ed. *ex assensu partium*, was adjourned until Crastino Animar. on which day, two others came in and were sworn, being of the first Panel.

The

The Court all clear of Opinion, that this is no Error, this being good enough, they being all to be called again. Leon. 3. part 38.

If a Juroz depart after he is swozn, Juror depart. he shall be fined and imprisoned, and by assent of parties, another Juroz may be swozn. Bro. Jurors 46 lib. 5. 40.

If a man be non-suited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently offered by the Jurozs. li. 8. 39.

C A P.

CAP. XV.

What Punishment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of *Embraceors. Decies tantum. Attaint*: several Fines on Jurors. What Issues they forfeit, and of Judgment for striking a Juror in *Westminster, &c.*

You have already heard how the Court may fine the Jurors for their misdemeanors in giving up their Verdict, I will proceed in shewing what punishments they are lyable unto, if they neglect their duty; and doubtless, no men have more need of knowing what penalties the Law inflicts on their offences, then common Jurors, who too often being preingaged with favour to the Plaintiff, or malice against the Defendant, Et sic e converso; or with common Interest, (as they call it) where Tythes or Commons are in question, will neither hearken to their Evidence, nor direction of the Judge. But subvert the whole drift of the Common Law, which will have them of the Neighbourhood, where

where the fact was committed, to the end, that they knowing most of the fact, may consequently give the best Verdict; yet contrariwise, Jurors which live nearest, do now a days, most commonly so fetter themselves with favour or animosities to the parties, that those which live furthest off (as Juries from other Counties) for the most part, give the cleaneſt Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend; the Law in this will be their Guide; for without doubt, (excepting life and member) the Law hath provided more severe punishments against Juries, than against any other offenders whatsoever; as well knowing that corruptio optimi est pessima: And common Jurors generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be concerned in the next, Oderunt peccare mali, formidine poenæ; wherefore the description of what this poena is, shall be the conclusion of this Treatise.

If any Juror take a reward to give his Verdict, and be thereof attainted, at the suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have imprisonment for one year, which

The penalty of
Jurors taking
Rewards

imprisonment shall not be pardoned for any fine, this is by the Statute of 34 E. 3. cap. 8.

Shall not serve
of any other
Inquest.

Imprisoned
and ransomed,
(that is) fined.

5 E. 3. ca. 10. It is accorded, That if any Juror in Assises, Juries or Enquests, take of the one party, or of the other, and be thereof duly attainted, That hereafter he shall not be put in any Assises, Juries, or Enquests; and nevertheless, he shall be commanded to prison, and further ransomed at the Kings will. And the Justices before whom such Assises, Juries and Enquests, shall pass, shall have power to enquire and determine according to this Statute.

A man would think that these Statutes should have frighted any Juroz from taking Rewards to give his Verdict. But

— Quid non mortalia pectora cogis
Auri sacra fames ?

So sacred is this love of Money, that Conscience her self must vail to it, and not stand in competition with such allurements: wherefore the Law did redouble its force; nay more, produced a Decies tantum, scil. That a Juroz taking reward to give his Verdict, shall pay ten times as much, as he hath taken; which forfeiture, methinks, should make even those

those who love Money best, refuse to take Money upon such an account, because it is like a Canker in their Estates, depriving them in the end, of ten times more than it brought; for which, hear the Statute 38 E. 3. cap. 12.

Item, As to the Article of Jurozs, in the *Decies tantum*, 24th year, it is assented and joyned to the same, that if any Jurozs in Assises sworn, and other Enquests to be taken between the King and party, or party and party, do any thing take by them or other of the party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by process contained in the same Article, be it at the suit of the party that will sue for himself, or for the King, or any other person, every of the said Jurozs, shall pay ten times as much as he hath taken. And he that will sue, shall have the one half, and the King the other half. And that all Embracers, that bring or procure such Enquests in the Country, to take gain or profit, shall be punished in the same manner and form as the Jurozs. And if the Juroz or Embracer so attainted, have not whereof to make agrée, in the manner aforesaid, he shall have the imprisonment of one year: And the intent of the King, of Great men, and of the Commons is, That no Justice, or other Minister, shall enquire of office, upon any of the points of this Article, but only at the Suit of the party, or of other, as afoze is said.

Embraceor.

Upon which Statute, there is a *Writ* called a *Decies tantum*; and who will, may bring it, for it is a popular Action, and lies (as you see) where any of the Jurors, after he is sworn, taketh of one party, or of the other, or of both (and then he is called an *Ambidexter*) any Reward to give his Verdict, &c. And it may be brought against all the Jurors and Embracers, although they take several Sums of Money: and although the Jury give no Verdict, or a true Verdict. But it doth not lye against an Embracer, if he taketh no Money, and embraces, or taketh Money, and doth not embrace. See Bro. Tit. *Decies tantum* 13. and F. N. Br. 171.

Ambidexter.

So F. N. Br. saith. But for my part, I think he is mistaken, for the Statute mentioneth nothing of his taking money; and in my opinion, the case of 37 H. 6. 13. is full against him.

Embracer.

Attorneys ill practice.

An Embracer, is he that procures the Jurors in the Country, to take gain or profit, or comes to the Barr with the party, and speaks in the matter, or stands there to surbey the Jury, &c. or to put them in fear, or solicits them to find on the one side or other; and this Fellow cloaks his Embracery, under pretence of labouring the Jurors to appear, & to do their Conscience: And thus the Attorneys in the Country, often take upon them to do, and many times put in a word or two for their Clyents; which practice deserves the most severe punishment, next to their getting the Sheriff to return such and such in the Jury; which they, having been Under-Sheriffs themselves, and so agree with one another, are most expert at.

But

But it was said by Roll. Ch. Just. That a Plaintiff might well intreat one Juror to appear, and that it was allowed in the Star Chamber, but a Stranger could not labour one Juror to appear.

But Counsellors at Law, may plead for Counsellors. their Money at the Barr; But they must not labour the Jury privately; and if they take Money for this, they are Embraccors. F. N. 6. Br. 171.

So much doth the Law hate, that Jurors should privately take Money for their Verdict. That certain Jurors were fined, for taking Money after their Verdict, though there was no preingagement for it. 39 Afile. p. 19. Fined for taking Money after their Verdict.

The practice is otherwise at this day; if it were not, the Middlesex Juries would not so Court the Bayliffs to return them, especially to Tryals at Barr; where 5 l. a man is frequent Gratuity, sometimes more.

If a full Jury appear, and some are challenged off, so that the Jury remains for default of Jurors, the Defaulters shall loose their Issues. 4 H. 6. 7. otherwise if a Jury be sworn, and one is withdrawn by consent. Issues.

But if there be a joinder of Counties, and a Jury of one County appear, and not of the

the other. The Defaulters of that County from which enough came, shall not loose their Issues; because the Inquest doth not remain for their default, but for the default of them of the other County, 48 Aff. 5. Mes quære.

Amercement.

If the Jurors at the return of Scire fac. make default, yet they shall not be amerced, because the parties may be claimed at the first day, but at the return of the Habeas Corpora they shall. 10 E. 4. 19. 1 E. 3. 12.

Demand sur
peine.

If any of the Jurors appear, the Court may charge them to inquire if any of the other Jurors were within the Town after the return; and if they find they were, they shall be demanded upon a Pein, and if they come not, they shall be amerced, Rolls tit. Trial. 632.

Juror fined
for departing
when he was
challenged.

A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default, he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, so that he might have been treit. But the Court would not admit this, because then the King would have lost his Fine. 36 H. 6. 27.

If a Juror appear, and is adjourned upon pain, and makes default, in this Case, because he shall be fined to the value of his Land per annum, this shall be inquired by his Companions of the Jury, because the Court knows not the value of his Land. li. 8. 41.

A Verdict was taken from the Foreman of the Jury, to which one of them did not assent, and damages assessed to 20 s. in Trespass and Assault; and afterwards, every one of the 11. were fined, for giving their Verdict, before they were all agreed. 40 Afile 10.

Where a Jury are to be fined, a Fine jointly imposed on them, is not legal, but they must be severally fined, because the offence of one, is not the offence of another. Et nemo debet puniri pro alieni delicto; For then it might be said, Rutilius fecit, Æmilius plectitur. lib. 11. 42.

A man stroke a Juror at Westm. (sitting in the Court) who passed against him, and he was thereof indicted, and arraigned at the Kings Suit, and attainted, his judgment was, that he should go to the Tower, and stay there in prison, all days of his life, and that his right hand should be cut off, and his Lands seised into the Kings hands, 41 Afile. p. 25. and now our Juror sees what punishment

Juror adjourned upon pain.

Fined for giving a Verdict before they were agreed.

The fine must not be joynt.

Punishment for striking a Juror.

nishment it is to strike him, in the face of the Court. Let him hold his hands from others, least the same Judgment light on him.

Issues.

By the Statute of 27 Eliz. cap. 6. It is Enacted, that upon every first Writ of Habeas Corpora, or Distringas, with a Nisi prius. 10 s. shall be returned in Issues, upon every person impannelled, and upon the second Writ 20 s. and upon the third 30 s. And upon every Writ that shall be further awarded to try any Issue, to double the Issues last, afore specified, until a full Jury be sworn.

Not summoned.

And these Issues being returned upon a Tenement in Fee simple, in tail or for life, of another, or himself, or in the right of his Wife; the Land he then hath will be chargeable for it, and any mans Cattel upon this Land may be distrained for it.

But if the Under Sheriff, &c. return a Juror summoned, who in truth was not legally summoned, and therefore doth not appear, and so loseth Issues, the Under Sheriff shall pay him double the value of the Issues lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And note, the Law hath been so careful to punish all offenders, who would endeavour

to byass, and corrupt the Jury; and to punish the Jurors themselves, if they receive Money to give their Verdict, or any other wise pre-engage themselves to any of the parties; All which is to the end, that a true and honest Verdict may be given: What punishment shall that Jury have, which gives a false Verdict?

Such a punishment, that (as I said before) in civil Causes it is without example; and surely, if the Jurors did bear it in their minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interests, or any partiality to either of the parties.

Wherefore if the Jurors give a false Verdict (which is perjury of the highest degree) upon an Issue joyned between the parties in any Court of Record, and Judgment thereupon. The party grieved, may bring his Writ of Attaint, in the Kings-Bench, or Common-Pleas; upon which, 24 of the best men in the County are to be the Jurors, who are to hear the same Evidence which was given to the Petite Jury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24. (who are called the Grand Jury) find it a false Verdict; then followeth his terrible and heavy Judgment, at Common Law, upon the Petite Jury.

¶ m m

i. That

Judgment in
Attaint.

1. That they shall lose liberam legem for ever, that is, they shall be so infamous, as they shall never be received to be a Wit-ness, or of any Jury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the Kings hands.

4. That their Wives and Children shall be thrown out of doors.

5. That their Houses shall be rased and thrown down.

6. That their Trees shall be rooted up.

7. That their Meadows grounds shall be ploughed up.

8. That their Bodies shall be cast into the Goal, and the party shall be restored to all that he lost, by reason of the unjust Verdict. So odious is Perjury in this Case, in the eye of the Common-Law : And the severity of this punishment, is to this end, Ut poena ad paucos, metus ad omnes perveniat ; for there is Misericordia puniens, and there is Crudelitas parcens. And seeing all Tryals of real, personal, and mixt actions, depend upon the Oath of 12 men, prudent Antiqui-

ty inflicted this severe punishment upon them, if they were attainted of Perjury. 1 Inst. 294.

But now by the Stat. of 23 H. 8. cap. 3. The severity of this punishment is moderated, if the Writ of Attaint be grounded upon that Statute.

But the party grieved, may at his Election, either bring his Writ of Attaint, at the Common Law, or upon that Statute. Wherefore let the Juror expect the greatest punishment, when he offends. 3 Inst. 163. 222.

And so I conclude as to the Juror, only with the words of *Fortescue*, Quis tunc (etiam immemor salutis animæ suæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ, veritatem non diceret sic Juratus?

Who then, though he regard not his Souls health, yet for fear of so great punishment, and for shame of so great infamy, would not, upon his Oath, declare the truth?

But as to our Practicer, I would give this one further Advertisement, which relates also to Jurors.

When a Verdict has been given by a former Jury in the same Cause, and on the
 P m m 2 same

same Evidence it is allowed to give the former Verdict in Evidence, and I have known this Introduced by the Counsel, as obliging to the latter Jury to find accordingly; intimating, that otherwise they do (in effect) perjure the former 12 men, which may amuse tender minds, and draw them from the strict Inquiry into the Merits of the Cause, in favour of their Predecessors; which is a palpable mistake and misinformation, for these Reasons.

1. The same Evidence in the former Cause and Tryal (perhaps) was not so perspicuously delivered as in this.

2. This latter Jury may be of more sagacious and Comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The Matter in Contest (perhaps) was not in the former Tryal so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And lastly, supposing, the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, manag'd by the Counsel, yet it's no perjury

or fault to differ in Judgment; for if 24 Jurymen were to try a Matter of Fact, and 12 were of one Opinion, and 12 of another, who is in fault? while they Judge according to the best of their Knowledge and Skill, to which (only) they are sworn. And it's a reasonable kindness to Jurymen, to make good Construction of differing Judgments among them, while we see, how oft Judges themselves differ in their Opinions, on a matter stated equally to them all, and that (not only as to matter of Law, but) as to matter of Fact, as attending Practicers may observe in Tryals at Barr, in the several Judges several Directions. And this I thought good to advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instance some Cases. Sed verbum sat, &c.

As to the difference betwixt the Judge and the Jury, and that Question which has made such a noise, viz. Whether a Jury is fineable for going against their Evidence in Court, or the Direction of the Judge? I look upon that Question, as dead and buried, since Bushel's Case, in my Lord Vaughan's Reports; yet some of the Ashes thereof I may sprinkle here without offence. It doth appear there to have been resolved by all the Judges upon a full Conference at Serjeants-Inn, That a Jury is not fineable for going against

against their Evidence where an Attaint lyes ; And that it is Evident by feveral Resolutions of all the Judges , That where an Attaint lyes, the Judge cannot fine the Jury , for going against their Evidence, or Direction of the Court, without other Misdemeanour.

And where an Attaint doth not lye , as in Criminal Causes upon Indiments, &c. My Lord Vaughan says these words , That the Court could not Fine a Jury at the Common Law , where Attaint did not lye ; I think to be the clearest Position that ever I considered either for Authority or Reason of Law. And one reason for this, which can never be answered, is , The Judge cannot fully know upon what Evidence the Jury give their Verdict ; for they may have other Evidence than what is shew'd in Court ; They are of the Vicinage, the Judge is a Stranger, they may have Evidence from their own personal knowledge , that the Witnesses speak false, which the Judge knows not of ; they may know the Witnesses to be stigmatised and infamous, which may be unknown to the Parties or Court.

And if the Jury knew no more than what they heard in Court, and so the Judge knew so much as they, yet they might make different Conclusions, as oftentimes two Judges do; and therefore, as it would be a strange and absurd thing to punish one Judge for differing with

with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the Direction of him who is not Judge of the Fact. But he that would be better satisfied in this point, may read that Case, and the Authorities, and Reasons given by my Lord Vaughan, whom I must honour, as a man of great reason.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their fellows after they are sworn; not receiving from either side Evidence after their Oath, not given in Court, not eating and drinking before their Verdict, refusing to give a Verdict, and the like; wherein if they transgress, they are fineable: But the Verdict it self when given is not an act Ministerial, but Judicial, and according to the best of their judgment; for which they are not fineable, nor to be punished but by Attaint.

For can any man shew, That a Jury was ever punished upon an Information, either in Law, or in the Star-Chamber, where the Charge was only, for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation & the like, were joyned.

But

But the Fining and Imprisoning of Jurors for giving their Verdicts, hath several times been declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous Consequence to the Government, the Lives, and Liberties of the People. This celebrated cryal by Juries, having been confirmed by many Parliaments.

Littleton, Sect. 368. tells us, That as the Jury may find the matter at large, that is a Special Verdict, (which the Court cannot refuse, if it be pertinent to the matter put in Issue) and leave the Law to the Court so if the Jury will, they may take upon them the knowledge of the Law upon the matter, and may give their Verdict generally, as is put in their Charge. As for example, upon all general Issues; As Not guilty pleaded in Trespass, Nil debet in Debt, Nul Tort, nul disseisin, in Assise. Ne disturba pas in Quare impedit, &c. Though it be matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor, or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff, or Defendant, upon the Issue to be tryed, wherein they resolve both the Law, and the Fact complicitly, and not the Fact by it self. And so upon Not guilty to an Indictment of Felony, Breach of the Peace, Trespass, &c.

and

and other Cases where the Law and the Fact are complicate and joynd, they may determin upon both: Yet I must give them my Lord Coke's Caution, which is, That although the Jury, if they will, may take upon them the knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the danger of an Attaint. Therefore to find the matter specially, is the safest way where the Case is doubtful.

And to end, as I begun, That Decantatum in our Books (as my Lord Vaughan calls it) Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, Literally taken is true; for if it be demanded what is the Fact: the Judge cannot answer it: If it be ask'd, what is the Law in the Case: the Jury cannot answer it. But upon the general Issue, if the Jury be asked the Question, guilty, or not: which includes the Law, they resolve both Law, and Fact, in answering Guilty, or Not Guilty. So as though they answer not singly to the Question what is the Law; yet they determine the Law in all matters, where Issue is joynd and tryed, but where the Verdict is Special. But in such Cases, the Judge cannot of himself answer, or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best kind of

P u n

Tryal

tryal in the world for finding out the Truth;
and the greatest safety of the just Preroga-
tives of the Crown, and the just Liberties of
the Subject; and he which desireth more for
either of them, is an Enemy to both.

FINIS.

)

PRECEDENTS,

CONTAINING

The Forms of Challenges

TO THE

ARRAY, &c.

AND THE

PROCEEDINGS thereupon.

Pleas Puis le Darrein Continuance,
Demurrers upon the Evidence,
Bills of Exception, &c.

AND

The LAW concerning the same.

Very Useful for all Lawyers and Practi-
cers; especially at the ASSIZES, &c.

By G. D. of the Inner-Temple, Esq;

L O N D O N,

Printed Anno Dom. 1682.

1

PRECEDENTS,

Containing the forms of Challenges to the Array, &c. and the Proceedings thereupon. Pleas *Puis le Darrein Continuance*; Demurrers upon the Evidencē; Bills of Exception, &c. And the Law concerning the same, very useful for all Lawyers and Practicers; especially at the Assizes, &c.

A Form of Challenge to the Array.

ET nunc ad hunc diem sciēt &c. venit predict' A. Quer' & B. Defend p attornat suos, & Juratores fuer Impanellet & demand & venerunt, & Inde predict' B. Calumniabit Arrajam panellet predict' quia, &c.

This must be read by the Council in French, and delivered to the Clerk to read it in Latin.

A

A Challenge to the Array , because the Sheriff is Cousin, &c.

Et sup hoc idem Henricus Vernon calumpniat Arraimenti pannelli p̄dic' quia dicit. quod panelli illud arriat' fuit p̄ quendam Johannem Zouch Militē jam & tēe Arraiment' p̄p̄s fact' vīc p̄p̄s Cōm' Derb' qui quidem vīc est consanguineus p̄p̄s Johannis Maners vīz. filii Georgii Zouch Arī filii Johannis Zouch Mil. fil' Johannis Zouch Arī filii Johannis Zouch Arī filii Willielmi Domini Zouch filii Alan Domini Zouch filii Willielmi Domini Zouch filii Elizabethe filie Willielmi Domini Roos Patrīs Willielmi Domini Roos Patrīs Thome Domini Roos Patrīs Elianore Patrīs Georgii Manners Militis Patrīs Thome Comitīs Rutland Patrīs p̄p̄s Johannis Manners Et hoc paratus est verificare unde petit Judicium ac quod panellum p̄p̄s cassetur, &c. que quidem calumpn' p̄ p̄p̄s Tho. Stanley dedit p̄ N. Sturley de Beachiff Ar & R. F. de T. Ar triatores ad hoc electos & furatos compta est vera Ideo panellum p̄p̄s cassetur & amoveatur, &c. Cokes Entries, 340.

A Challenge because the Sheriff is Tenant, &c.

Et sup hoc idem Johannes Dom̄ St. John vīc qd J. D. Ar vīc Cōm' p̄d jam existit quodqz
idem

idem J. D. tenet duodecim acras prati cum
 priu in Budenham in Comi p̄d de ipso
 Johanne Domino St. John ad voluntatem p
 reddit 40 s. eidem Johanni Domino St. John
 annuatim solvend Et ea de causa petit hic
 Domine Regine de ve fac' hic r̄cem, &c.
 ad triandum exitum p̄d superius junct Co-
 ronatorib⁹ ejusdem Domine Regine in Com
 p̄d dirigend, &c. Super quo p̄d Tho. dic qd
 p̄d Jo. D. non tenet p̄d r̄y acras prati cum
 priu nec aliquam inde parcelle de p̄fat J.
 Domino St. John ad voluntat put idem Jo-
 hannes Dominus St. John superius allega-
 vit Ideo non obstante Calumpnia p̄d Jo.
 Dñi St. John ad p̄fat vic Preceptū est eidem
 vic qd ve. fac. hic, &c. Cokes Entries 397.

A President of a Challenge for Default of
 Hundredors which hath been several
 times made use of at the Assises.

Et super hoc p̄d A. B per C. D. Attorū suum
 ven & Calumpn Arriament pannell p̄d quia
 dic qd villa de Dale in Comi p̄d in qua quidē
 villa causa Actionis oritur & in narratione
 p̄d quet. locatur & oriri suppon est & Tem-
 pore arriamenti pannelli illius fuit & adhuc
 existit infra hundred de Downs in Comi p̄d
 quodqz modo vic Comi p̄d non Retorū seu
 impannellavit aliquos hundredos de hundred
 de Downs p̄d ad triand exit int partes p̄d
 modo junct nec Jut modo Impannellat &
 retorū

retorū habent seu aliquis eorundem Jur̄ habuit vel modo habet aliquas terras seu tenebras infra hundred de Downs p̄b nec habent habuerit seu aliquis eorundem Jur̄ habuit tempore Arriamenti pannelli p̄b seu unquam antea vel postea seu habitant vel Commorant aut aliquis eorundem habitabat vel Commorabat infra hundred p̄b modo vel Tempore Arriamenti pannelli illius Et hoc parat est verificare unde per Judicium Et qđ pannellum illud Cassetur, &c.

This must be under Counsels Hand, and the Proceedings herein you may read before, if they Demurr thus

Foratur in Lege

W. T.

Forunder in Demurrer

G. D.

The Form of a Challenge made by the Defendant, because the Plaintiff is the Sheriffs Cousin.

Et super hoc p̄dictus Defendens per A. B. Attorū suū ven̄ & Calumpn̄ Arraiament pannelli p̄b quia dicit qđ pannellum illud factū & arriatū fuit per C. D. At modo & Tempore Arriament pannelli p̄b v̄c Cōm p̄b quiquidem v̄c est Consanguineus E. H. gen̄ modo dimissozī quē in narratione p̄b quē mentionat videt filius G. H. gen̄ filii K.

K. L. filie M. N. filii O. P. Patris Q. R.
 Patris p̄s E. F. modo dimissoꝝ quē in nat̄
 p̄s nominat Et hoc parat̄ est verificare unde
 p̄t̄ Judḡm & qđ pannellum illud casse-
 tur, &c.

If the Plaintiff deny the Kindred and Affi-
 nity, then thus,

Nient Cousin par le Panuer.
 W. T.
 est Cousin
 G. D.

Then are two or more Triors sworn, but
 seldom more than two, and (after they have
 heard the Proofs and Evidence given to make
 good the Defendants Plea) they give their
 Verdict accordingly.

Note, The Plaintiff may if he please De-
 murr upon the Challenge.

A Challenge to the Array , because no Knight
 was return'd upon the Jury.

Et super hoc predictus Comes p̄ A. B. At-
 toꝝ suum ven̄ & Calumpn̄ Arraiament̄
 pannelli Assize p̄s quia dicit qđ ip̄e est &
 Tempore Arraiamenti pannelli illius & an-
 tea fuit Et adhuc est un̄ magnat̄ & pa-
 tr̄um hujus Regni Angliæ & vocem & locum
 in quolibet Parlamento ejusdem Regni ha-
 bens Et qđ Arraiament̄ Assize pannelli p̄s

¶ o o

Arraiat̄

Arriat fuit p C. D. Mil nuper viſ pō
 Cōm E. nullo Milite in eodem pannello
 Arriament illius nīat & retozū eristen ſicut
 eſſe debuit ſecundum legem huius Regni
 Angliæ & hoc parat eſt verificare unde pet
 Judgñ Et qđ pannellum illud Caſſetur, &c.

Vies tiel Challenge in le liure de Monsieur
 Plowden & demurrer ſur ceo joinder in de-
 murrer & Judgment que le pannell ill ſoit
 caſſe en le Caſe del Count de Darbie, fo. 117.

A Challenge againſt the Sheriff for Return-
 ing the Jury at the Inſtance, Requeſt, and
 Denomination of the Plaintiff.

Et ſuper hoc eadem A. B. p C. D. Attozū
 ſuum ven & Calumpñ Arriament pannelli
 ejuſdem Jurē quia viſ qđ pannellum illud
 fact & arriat fuit p E. H. mil modo viſ
 Cōm pō & Miniſtros ſuos ad denominatio-
 nem & promotionem ipſius queſ & infavorem
 ejuſdem queſ & hoc parat eſt verificare unde
 pet Judgñ & qđ pannellum illud caſſetur, &c.

To which the Plaintiff may plead that the
 Array of the Pannel, Wreſ bene & equalit
 ſadum & arriat fuit p pōdictum viſ & Minis-
 tros ſuos, &c. ſurta officii ſui debet.

Or

Or the Plaintiff, if he will, may confess it. But if he Plead, then the Judges immediately assign Triors to try the Array, which seldom exceed two, who being chose and sworn, the Associate or Clerk in Court doth declare and rehearse unto them the matter and cause of the Challenge, and after he hath so done, concludes to them thus, And so your Charge is to enquire whether it be an even and Impartial Array, or a favourable one; and if they affirm it, Then the Clerk enters underneath the Challenge.

Affirmatur.

But if the Triors find it favourable, then thus,

Calumpnia vera.

A Challenge because that the Town is within a Hundred of which the Plaintiff is Lord, and Prays a Writ to the next Hundred.

Et super hoc p̄d A. dīc qđ p̄dicta villa de Dale de qua transḡt p̄d facta fuit est infra hundred de B. Et quod ipse est Dñs ejusdem hundredi quodq; omnes lib̄ Tenentes infra hundred illud sunt infra districtionem ipsius A. Et ea de causa p̄t h̄c Dñm Regis de venire faciendū hic r̄ij &c. ad triandū exitum p̄dictum de p̄or vīlū in Cōm p̄d extra hundred p̄d ville de B. p̄or adjacēt vīc Cōm p̄d dirigendū Et quia p̄d Defendens hoc

¶ 0 0 2

non

non dedit ei conceditur, &c. Jo. pcept est vic qd venire fac hic in Octab scti Hillary xij, &c. de ppor & visu in Conr pd extra hundred pced pcedite ville de Dale ppor adiaceu p quos, &c. Et qui nec, &c. ad Recogn &c. quia tam, &c.

Challenge because the Sheriff and two Coroners are Tenants of the Plaintiff, and a *Ven. fac.* awarded to the rest of the Coroners.

Et sup hoc pd A. B. dic qd tam pd C. D. miles nunc vic Conr pd qm E. F. & G. H. duo Coron sunt Tenentes ipsius nunc I. Et infra districtionem suam Et ea de causa pef bre ipsius Domi Regis de Ven. fac. hic xij, &c. E. A. & R. P. restd Coron esuldem Domi Regis in Conr pd dirigend ad triand exit pd & quia pd W. hoc non dedit ei conceditur, &c. Jo. pced E. A. & R. P. quod Ven. fac. hic, &c.

Challenge where after the last Continuance the Cosin of the Plaintiff is made Sheriff after Issue joyned,

Quia tam, &c. Ad quem diem hic veu partes, &c. Et vic non misit bre Et super hoc predictus Quer dic qd post ultimam continuationem placiti videt postea Octab scti Michis ultimo prefico de quo die loquela pd ult

ulꝛ continuat fuit hic usqꝫ ad hunc diem sci-
licet tali die ultimo pꝛetito Dominus Rex
nunc per lras suas patentes Commisit cui-
dem A. B. mli custodiam Conr pꝛo quarum
quidem literarum pateñ pꝛetextu idem viꝛ
Conr illius jam existit Quiquidem A. B. est
Consanguineus pꝛo quẽ vizt fil, &c. Et ea
de causa pet bꝛbe Domini Regis de venire
fac, hic rꝝ, &c. Coron Diꝛ Conr Regis Conr
pꝛo dirigend Et quia pꝛedictus Defendens hoc
non didicit ei conceditur, &c. Et pꝛet est
Coron Domr. Regis Conr pꝛo ven. fac, &c.

Challenge because the Sheriff is of Council
with the Plaintiff, and hath received Fees,
and the Defendant doth deny the Chal-
lenge, therefore the *Venire fac.* awarded to
to the Sheriff notwithstanding.

Et super hoc pꝛdictus quẽ diꝛ qꝫ quidem
A. B. viꝛ Conr pꝛo modo existit quiquidem
A. B. est de consiliis ipsius quẽ & habet de
eodem quẽ Annuum Reddunt sive feod rꝛ l.
Et ea de causa pet bꝛbe Domr Regis de veni-
ficiend' hic rꝝ, &c. Coron Domr Regis Conr
pꝛo dirigend Et quia pꝛedictus defendens hoc
dedic Io non obstante allegationis pꝛo quẽ
pꝛet est vic, &c.

Challenge

Challenge because the Plaintiff is Brother
to the Sheriff.

Et super hoc quidem querens dicit quod A. B.
miles modo dicit Comitem per eum existit et frater ejusdem
querit Et ea de causa per breve Domini Regis de
Venire faciendum hic regis, &c. Coroner dicit Domini
Regis Comitem per dirigendum Et quia per defen-
dens hoc non videtur ei conceditur, &c. Ad, &c.

Challenge where the Plaintiff is Sheriff, and
one of the Coroners in his Tenant.

Pasche 24 H. 8.
Rot. 138.

Et super hoc per Querit dicit quod ipse est vice
Comitem per et quod sunt in eodem Comite Duo Co-
ron videlicet R. H. et R. D. quorum idem R. H.
unus Coroner ejusdem Comitis tenet de ipso querit
unum Messuagium, &c. per fidelitatem et aus-
nuum reddit singulis annis ad festa, &c. per
equales portiones solvendum Et eis de causis
per breve Domini Regis de Ve fac. hic regis, &c.
placet R. D. alii Coroner Comitem per dirigendum
et quia, &c. conceditur Et preceptum est eidem
R. D. quod, &c.

Another Challenge to the same purpose.

Pasche 20 &
21 H. 8. Rot.
424.

Et super hoc idem querit dicit quod A. B. vice &c.
tenet 10 acra terre cum pertinentiis, &c. de ipso
querit ut de Mannerio, &c. per fidelitatem, &c.
Et ea de causa per breve ut supra.

Challenge

Challenge because the Wife of the Plaintiff
is Kin to the Sheriffs Wife,

Et super hoc idem Querens dicit quod predicta Mich. 11 H. 7.
Bridgitta nunc uxor H. I. modo videlicet Comitis predicti Rot. 453.
consanguinea A. uxori prefate querit videlicet
filia Militoris ipsius A. uxori prefate querit
Et ea de causa petit hanc, &c. Coronam, &c.

Challenge because the Plaintiff is the
Sheriffs Servant.

Et super hoc idem Querit dicit quod ipse est
seruiens & de libertate R. T. militis modo videlicet
Comitis predicti & ea de causa, &c.

Challenge after the Jury Impannelled, re-
torn'd and called, because the Prie in Aid
is Sheriff, and of the Councel of the Plain-
tiff, and a Distringas Jur' with A. 19
tales Coron' awarded.

Et modo hic adhuc diem venturam predictam R.
Ac predicti J. S. & W. V. qui se seperatim
funxerunt, &c. quam predictam W. M. per Actorem suos
predictam & Jur' inde impannellat exact quidem eo-
rum veniunt & quidem eorum non veniunt prout pa-
tet in pannello, &c. & super hoc predictam R. H. ac
predictam J. S. & W. V. qui seperatim funxerunt, &c.
dicit quod predictam J. S. modo videlicet Comitis predicti existit
quodque idem J. S. est de feodo predictam W. & consil-
lii

Sur Hill. 9 H. 8.
Rot. 343.

lie in premissis & aliis negociis suis et aliis
de causis per hunc de distring. Jur. Iure pre-
dicte unacum 10 talib9 de visu pō eis
imponendū Corōn Donr Regis Conr pō diri-
gendū super quo quesitū est a pōdico W. M. si-
quid pro se habeat vel dic. Sciat quare hūc
illud Corōn Donr Regis Conr pō distring
Jur Iure pō unacum 10 talib9 de visu pō
eis imponendū ratione permissorum fieri non
debet quia dic qd non Iō pō est Corōn Donr
Regis pō qd distring Jur Iure pō p omnes
terras, &c. & qd de erit, &c. Ita qd habent
corpora, &c. ad fac Juram pō Et appon ei 10
tales, &c.

Challenge because the Plaintiff is one of the
Sheriffs of London, and the Ven' fac' awarded
to the other Sheriff.

Et super hoc pōdictus Querens dic qd ipse
at quidem Johannes Blunt miles sunt vic
London & pro eo qd ipse est unus vic London
pet qd processus de Venire fac. hic rty, &c. ad
triandū exir pōdictum pōfat J. B. tantum diri-
getur, &c. & quesitū est a pōfat defendū siquid
dicere Sciat quare processum illi pōfat Johan-
ni Blunt altero vic &c. tantum ea ratione
fieri non debet qui dic qd non Iō pō est ei-
dem Johanni Blunt altero vic &c. qd Ven. fac.
in Datā pōr: Ita qd pōdictus querens in nul-
lo se intro mittat rty, &c. per quos, &c. & qui
net, &c. ad recogū &c. quia tam, &c.

Challenge

Challenge to the Depury Sheriff, because he
Impannell'd and returned the Jury at the
instance and denomination of the Plaintiff.

*Et super hoc p̄d Defendens Calumpnū Ar-
raiam̄tum pannelli Jurate p̄d eo qđ pannel-
lum illud factum & arraiat fuit pT.W. sub viē
Cōm̄ p̄d ad denominationem p̄d quē & in
favorem & promotionem ejusdem quē Que-
quidem Calumpnia p Triatores ad hoc elect
& Jurat Comperta est vera Jō, &c.*

Challenge by the King's Serjeant upon an In-
dictment of Felony, because the Sheriff re-
torn'd the Jury of Life and Death at the in-
stance and request and denomination of
the Prisoner.

*Laurentius B. nuper de A. in Cōm. p̄d.
gen. cap̄t &c. Recitando totum indictamen-
tum usq; Jō fiat inde Jurā &c. Super quō
A. B. serviens Dom̄ Regis ad legem pro eo-
dem Domino Rege Calumpnū Arraiament
pannelli Jurē p̄d quia viē qđ pannellum il-
lud fact & arraiat fuit p Henricum Fortescue
viē Cōm̄ p̄d ad denominationem p̄fat Lau-
rentii & in favorem & promotionem ejusdem
Laurentii quequidem Calumpnū p Triatores
inde Jur̄ compert est vera Jō pannellum a-
mobeatur & cassetur, &c. & Venire fac. award-
ed to the Cōm̄.*

Challenge by the King's Serjeant for the King
to some of the Jury for Default of Freehold,
to the value of 40s. per Annum.

Super quo facta publica proclamatione pro
Domino Rege, &c. ac quidem J. G. miles ser-
viens dicti Domini Regis ad legem nunc pro eo-
dem Domino Rege veni & quidem Iur modo
comparem videbit J. L. in Iuram p̄b Iurat
existit Et quia resid Iur ejusdem Iure modo
Comparem non habent acras seu tenementa
in Com̄ p̄b ad annum valorem xl s. a pannel-
lo illo penitus extrahuntur, &c.

Entry of a
Challenge af-
ter Issue joyn'd
where the Sher-
riff is amo-
ved, &c.

Between *Barke-*
ley and *Jeffe-*
son.

Mich. 23 and 24 Eliz. Rot. 109. There-
fore came thereupon the Jury before the Lord
the King at Westm. the day, &c. and who
neither, &c. to Recognize, &c. because as
well, &c. the same day is given to the said
parties there, &c. at which day before the
said King at Westm. came the said Parties
by their said Attorneys, and the Sheriff sent
not the Verdict; and upon this, the same
Plaintiff saith, That after the last conti-
nuance of the said Plea, that is to say, after
the Saturday next after, &c. now last past;
from which day the said Plaintiff was conti-
nued here until this day, that is to say, the
day, &c. R. P. Clerk; late Sheriff of the said
County of E. from the same Office of Sher-
riff of that County was duely amoved, and
the said King now by his Letters Patents,
hath

hath Committed unto one T. P. Knight, the Custody of the said County of E. by presence of which said Letters Patents the said J. P. now remaineth Sheriff of that County, which said T. P. of A. at A. aforesaid, took to his Wife Anne of the Blood of M. now the Wife of him the Plaintiff; that is to say, the Daughter of R. D. the Son of W. D. Knight Father of Anne, Mother of the said M. now Wife of him the Plaintiff; which said T. P. Knight, and A. had Issue between them A. P. yet alive, and in full life remaining at A. aforesaid, and this he is ready to prove, &c. And out of that cause he prayeth a Writ of the Lady, the now Queen, of Venire fac, to try the said Issue in form aforesaid joyned, to be directed to the Coroners of the said County; and because the said Defendant doth gain-say, and doth not grant that to be true, therefore notwithstanding the same Challenge, a Command is to the Sheriff, that he make to come Twelve, &c. of the Wilsne of B. by whom, &c. Challenge gain-said.

Easter Term, 38 H. 8. Rot. 558. And hereupon the Defendant doth Challenge the Array of the Pannel of the said Jury, because he saith, That that Pannel was made and arrayed by A. and C. Coroners of the said County at the Denomination, and in favour of the Pannel of the said Plaintiff, and this he is ready to verifie, and requesteth that the same Pannel may be quashed. And the Challenge to the Array, because the Coroners made the Pannel at the Denomination of the Plaintiff.

said Plaintiff saith, That the said Pannel by the said Coroners was well and equally made; and not at the denomination, nor in favour, nor in promotion of the said Plaintiff; whereupon the said Justices by the consent of the said Parties, did chole and assign D. and E. two of the said Jury now appearing, to try the said Challenge; which said Tryors being elected and tryed, say upon their Oaths, That the said Pannel was well and faithfully made and arrayed by the said Coroners, and not at the denomination, neither in favour nor in promotion of the said Plaintiff; whereupon the Jurors of the said Jury being called, tryed, and sworn, say, &c.

A Precedent of Challenge to the Array.

May it please you, Mr. Baron, This Enquest you ought not to take, for that Sir John Ramsden Knight, Sheriff of the County of York, who did return the Pannel between the said A. Plaintiff, and B. Defendant, is Confin to the Plaintiff, &c. and shew how of Minn, &c. and so where the Challenge is for lack of Hundredors, or other principal Challenge put it down, &c. and this he is ready to averr, whereof he prays Judgment, and that the said Pannel be quashed.

Or

Or thus, And now at this day S. &c. comes the aforesaid J. S. Plaintiff, and J. B. Defendant by their Attorneys, and the Jurors also impannelled and demanded did come, and thereupon the said J. B. doth Challenge the Array of the Pannel aforesaid, because, &c.

This must be put in Writing, but under Counsels hand, where the Challenge is to the Poles, it is in short way by a Verbal Challenge; for the learning of this is excellent, and copious in our Books.

A Precedent of a Plea after the last Continuance.

And now at this day, &c. comes such a one Defendant by J. C. his Counsel, and saith, This Action the Plaintiff against the Defendant ought not to maintain; for that after the Quindene. of the Holy Trinity last past, from which day until such a day in Michaelmas Term next, unless the Justices of Assizes before come such a day, &c. the Action aforesaid is continued, &c. the Plaintiff by his Deed dated, &c. did Release, &c. and shew the Matter what it is, whether in abatement in Bar dilatory, or peremptory, as the Case is, &c. and this he is ready to averr.

Note,

Note, Brook in his Abridgment, tit. Continuance, 61. & 83. says, That after the Inquest is awarded to inquire of Damages, The Defendant cannot plead a Plea Puis le darrein Continuance, because he hath no day in Court to Plead.

The day of Nisi prius, and day in Bank are all one; so that a Release made betwixt these days cannot be pleaded in Bank; but it seems that a Release made between the day of the Venire facias returned, and the Writ of Nisi prius awarded, and the day of the Nisi prius may be pleaded at the day of the Nisi prius but not after the Verdict, 21 H. 6. fo. 10. Bro. tit. Jour. &c. 31 tit. Continuance, 76. 42. 27. 13.

A man shall have but one Plea after the last Continuance; for the Plaintiff shall not be delayed ad infinitum, 16 H. 7. 11. Bro. tit. Continuance, 59. 41. 45, 46. 5. 21.

After the Inquest taken by default, and before Judgment the Defendant came and pleaded an Arbitrament, made after the last Continuance; And by the Opinion of the Court, he had no day in Court to plead this Plea, and 'twas said, That he could Plead no Plea in such Case, but as Amicus Curiae, and of matter apparent he shall be received; otherwise, he must resort to his Audita

dita Quarela 21 H. 7. 33. Broke ibid. 38.

But if the Jury remain for default of Jurors, the Defendant may plead a Release, &c. at the day in Bank Puis le darrein Continuance, although he did not offer it at the Nisi prius, otherwise if the Jury had been taken at the Nisi prius, 22 H. 6. 1. Broke. ibid. 30.

If it be pleaded at the Nisi prius, the Court Record the Plea, and discharge the Inquest, and give day to the parties in Bank, Bro. ibid. 34. 8.

In Debt after Issue joyned, the Defendant at the Nisi prius pleaded Payment of part after the latter Continuance in Abatement. And the Jury being discharged, and the Plea adjourned in Bank; for that no place of Payment was pleaded, the Plaintiff had Judgment to recover his Debt, because after Issue joyned, no Responses ouster can be awarded, L. 5. E. 4. 139. Aleyn's Reports 66. in the Case of Beaton and Forrest.

Now, although when difficulty arises in the Evidence, the matter is most commonly (of late) found specially, and Demurrers on the Evidence are seldom used; yet inasmuch as it is sometimes done, and that our Practicer may be prepared with an Authentick Precedent for that purpose, I shall
trans-

transcribe one out of Coke's Entries, fo.
134. viz.

II.
Postea.

Postea die & loco Infra Content Coram
Jacobobo Dyer Milite Capitali Iustitiar Domini
Regine de Banco & Nicolao Barham uno ser-
vient dicti Domini Regine ad legem Iustit ip-
sius Dñe Regine ad assisas in Com N. Ca-
piend assigñ p formam statuti, &c. vestram
infra nominat J. A. quā infra script H. C.
p atturnat suos infra Content & Iur Jure
unde infra fit mentio Cract similis venet,
Qui ad veritatem de infra Content dicend,
electi, triati, & Iurati fuer Super quo pō
H. p quendam J. B. de Consilio ipsius H. C.
manutentione exitus interius Iunct Coram
pstat Iust Iur pō in Evidentiis ostend & dic
quod, &c. [Here recite the Evidence truly]
unde petit Iudiciū, & qd Iur pō veredict
suum de & sup infra Content pro ipso H.
reddant, &c.

Demurrer.

Et pō J. A. p quendam C. J. de Consilio suo
dic qd materia pō p pstat H. C. Iur pō
supius in Evidentiis ostent minus in lege
existit ad pō band exitum interius Iunct pro
parte ejusdem H. quodqz ipse ad materiam
illam in forma pō in Evident ostent necesse
necesse non habet nec p legem tert tenet re-
spondere, & hoc paratus est verificare, unde
pro defectu sufficient mater Iur pō in hac
parte ostent. Idem J. petit Iudic. & quod
Iur de Veridict suo sup Exit pō reddend ex-
oneretur

oneretur & debitum suum infra spec̃ una cum dampñ suis occasione de tenē debiti illius sibi addiundi cari, &c.

Et p̃b H. C. Ex quo ipse suffic̃ mater̃ in lege ad manutenen erit infra Content̃ pro parte ipsius H. Int̃ p̃b̃ sup̃ius in Evident̃ ostens. qđ ipse pat̃ est verificare, quā quidem materiā p̃b J. non dedicit nec ad eam aliquāliter respond̃ sed verificationem illam admitt̃ere omnino recusat p̃t̃ Judic̃, & qđ p̃b J. ab actione sua p̃b̃ versus Cum habend̃ p̃cludatur, ac qđ Int̃ p̃b̃ de Weredict̃ suo sup̃ erit p̃b̃ reddend̃ onerentur, &c.

Joynde

A Precedent of a Demurrer upon the Evidence.

And now at this day the said Plaintiff and Defendant by their Attornies did appear; and the Jury likewise did appear and were sworn, &c. upon which Sir T. W. Serjeant at Law, of Council with the Plaintiff, gave in Evidence so and so; and repeat it truely, and did require the Jurors to find for the Plaintiff, upon which, J. C. of Council with the Defendant saith, That the Evidence and Allegations aforesaid alledged, were not sufficient in Law to maintain the Issue joyned for the Plaintiff, to which the Defendant needeth not, nor by the Laws of the Land is not holden

¶ ¶ ¶

to

to give any Answer; wherefore for default of sufficient Evidence in this behalf, the Defendant demands Judgment, that the Jurors aforesaid of giving their Verdict be discharged, &c. and that the Plaintiff be barr'd from having a Verdict, &c. Then the Plaintiff joyns and says, That he hath given sufficient matter in Evidence, to which the Defendant hath given no Answer, &c. and demands Judgment, and that the Jury be discharged, and that the Defendant be Convicted; then the Jury may give Damages, if Judgment shall happen to be for the Plaintiff, &c.

A Bill of Exception.

Ebor. sc.

Memorand. That the first day of August, An. 1650. before T. P. and W. Justices of our said Lord the King for taking of Assizes in the said County assigned, in a Plea of Trespas and Ejectment, which J. S. in the Court of our said Lord the King before himself, by Bill doth prosecute against E. B. supposing by the said Bill, that the aforesaid T. B. &c. and recite the substance of the Declaration, or what it is, &c. and the Issue, and then what the Evidence to prove the Defendant guilty was, &c. which here was a Surrender of a Copyhold out of Court, &c. and that he desired the Jury aforesaid to give their

their Verdict for the said T. B. of and upon the Premises, and that he likewise desired the Judges aforesaid that they would inform the Jury aforesaid, that the Surrender aforesaid out of Court made, was good and effectual in Law, and the aforesaid Justices, the aforesaid Surrender of the Land aforesaid, with the Appurtenances made out of Court of the Mannour aforesaid, in form aforesaid, did affirm to the said Jurors was not good in Law, by which the said Thomas for that the aforesaid matter to the said Jurors in Evidence shewed doth not appear, &c. did request of the said Justices according to the form of the Statute in such case provided this present Bill, which doth contain in it the matter aforesaid above by him to the Jurors aforesaid shewed, by which the said Justices at the request of the said Thomas this Bill have sealed at D. aforesaid.

Clayton's Reports.

1. Westm. 2. 31. 13 E. 1. When the Justices will not allow a Bill of Exception upon Prayer, if the Party impleaded tender the same unto them in Writing, and requires their Seals thereunto, they or one of them shall do it.

2. If the Exception sealed be not put into the Roll, upon Complaint thereof to the King, the Justice shall be sent for, and if he cannot deny the Seal, the Court

shall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute Westm. 2. cap. 31. before which Statute a man might have had a Writ of Error; for Error in Law either, in redditione Judicii, in redditione Executionis or in Processu, &c. which Error in Law must be apparent in the Record, or for Error in fact; by alledging matter out of the Record, as the death of either party, &c. before Judgment. But the mischief was if either party did offer any exception, praying the Justices to allow it, and the Justices overruling it, so as it was never entred of Record, this the party could not assign for Error, because it neither appeared within the Record, nor was any Error in fact, but in Law, and so the party grieved was without remedy until this Statute was made.

This Act extendeth to all Courts, to all Actions, and to both parties, and to those who come in their places, as to the vouchee, &c. who comes in loco tenentis.

It extendeth not only to all Pleas Dilatory and Peremptory, &c. to Prayers to be received, Oier of any Record or Writ, and the like; but also to all Challenges of Juroys, and any material Evidence given to any Jury, which by the Court is Over-ruled. 2 Inst. fo. 427. All

All the Iustices ought to Seal the Bill of Exceptions, yet if one doth it, it is sufficient, if all refuse, it is a contempt in them all. And the party grieved may have a Writ grounded upon this Statute, commanding them to put their Seals Juxta formam Statuti. & hoc sub periculo quod incumbit nullatenus omittatis.

The party must pray the Iustices to put their Seals, but if they deny it, they may be commanded, and may do it after Judgment.

If the party grieved be dead, his Heirs or Executors, &c. according to the Case, may have a Writ of Error upon this Bill of Exceptions. And no diminution can be alledged, for the parties are confined to the matter in the Bill.

If the Justice dye before he acknowledgeth his Seal according to the Act, a Scire fac. shall go to his Executor or Administrator, for the Death of the Judge is the act of God, which shall not prejudice the party: As in the case of a Certificate of the Marshal of the King's Host, that the person outlawed was in the King's Service beyond Sea, in a Writ of Error a Scire fac. shall go to the Marshals Executor or Administrator upon shewing the Certificate.

If the Judge denyeth his Seal, the party may prove it by Witnesses, ib. Error

Error of a Judgment at the Grand Sessions in the County of Pembrok, in an Assise of darrein Presentment, by Henry Cort against the Bishop of St. Davids, Dorothy Owen & al. for the Church of Stackpoole.

The fourth Error assigned was, because the Issue being, whether H. Cort did last present one R. D. the last Incumbent who was instituted and inducted upon his Presentation: The Plaintiff offered in Evidence Letters of Institution, which appeared to be and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there; And those Letters were made out of the Diocels; And the Defendant had demurred thereupon, That those Letters were insufficient, and the Demurrer was denyed, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held that the not admitting of the Demurrer ought not to be assigned for Error: for when upon the Evidence the matter was over-ruled by the Justices of Assize, That was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in that Case; And for the matter of the Letters of Institution sealed with another Seal, and made out of the Diocels, it was held they were good enough, for the Seal is not material, it being an Act made of the Institution, & the writing
and

and sealing is but a testimonial thereof, which may be under any Seal, or in any place. But of that point they would advise, *Croke 1. part 340.*

Note, This Bill is to prevent the precipitancy of the Judges, and ought to be allowed in all Courts, and in all places of Pleadings, and may be put in at any time before the Jury have given their Verdict.

But this Bill is rarely used, there being *impar congressus*, betwixt the Judge and the Coancel; and the Prudence of the Judges induce them to find special Verdicts in Cases of doubt and difficulty.

A Release Pleadet at the Assises after Issue joyned.

Et pred. Def. in propria persona sua ven. & dic. quod pred. Justic. Dom. Regis hic ad caption. Jur. pred. inter ipsum Def. & prefat. Quer. procedere non debent quia dic' quod post xii diem F. ult. preterit. de quo die Jurat. pred. inter partes pred. continuat' fuit, & ante hunc diem [scilt. diem de Assise] scilt. primodie M. Anno, &c. apud, &c. pred. Quer. per nomen, &c. remisit, relaxavit, &c. Et hoc, &c. unde pet. quod Justic. pred. ad captionem Jur. pred. ulterius procedere nolunt. ff.

The Death of one of the Defendants Pleadet after the last Continuance.

Et pred. Def. per A. B. Attorn. suum ven. & pred. T. non ven. & super hoc pred. Def. dic. quod post ult. continuationem placiti pred. scilt. post xv. Pasche ult. preterit. de quo die loquela pred. ult. continuat. fuit hic usq. ad hunc diem scilt. in Cro. sce. Trin. tunc prox' sequen' & ante eundem diem scilt. decimo die Maii ult. preterit. pred. T. apud A. pred. obiit Et pet. quod null. process' nec aliquid aliud in placito pred. ulterius versus prefat. T. fiat Et quia pred. J. & K. hoc non dedic. Ideo null. process. nec aliquid aliud in placito pred. versus prefat. T. fiat, &c.

A Baron Challenges the Pannel because no Knight was returned of the same.

Et sup. hoc idem 7. calumpniat arraiament. panneli pred. quia dic. quod ipse est & tempore arraiament. panneli il. ius fuit Baro hujus Regni *Anglie*, locum & vocem habens in quol. Parlamento hujus Reg. Quodq; in eodem pannello nullus Miles nominat. & retorn. existit Et hoc paratus est verificare unde petit Judicium & quod pannelum illud cassetur, &c.

Evidence, and demurrer upon Evidence, Middleton against Baker. Cro. Eliz. 42. fol. 751.

In *Eject.* It was held by all the Court upon evidence to a Jury, That if the Plaintiff give in evidence any matter in writing, or Record, or a sentence in the Spiritual Court, (as it was in this case) and the Defendant offers to demurr thereupon, the Plaintiff ought to joyn in the demurrer, or wave the Evidence, because the Defendant shall not be compelled to put matter of difficulty to lay Gens, and because there cannot be any variance of a matter in writing. But if either party offer to demurr, upon any evidence given by Witness, the other, unless he pleaseth, shall not be compelled to joyn, because the Credit of the testimony is to be examined by a Jury, and the Evidence is incertain, and may be enforced more or less. But both parties may agree to joyn in demurrer upon such evidence. And in the Queens Case, The other party may not demurr upon evidence shewn in Writing, or Record, for the Queen, unless the Queens Council will thereto assent; But the Court in such case shall charge the Jury to find the matter specially, as appears 34 H. 8. Dyer 53. But this is by Prerogative. *vide lib. 4. 104.* the same case, and 1. Inst. 72. where my Lord Cook says, If the Plaintiff in evidence shew any matter of Record, or Deeds, or Writings, or any sentence in the Ecclesiastical Court, or other matter of evidence by Testimony
of

of Witnesſes or otherwiſe, whereupon doubt in Law ariſeth, and the Defendant offer to Demurr in Law thereupon, the Plaintiff cannot reſuſe to joyn in demurrer, no more than in a Demurrer upon a Count, Replication, &c. and ſo è converſo, may the Plaintiff Demurr in Law upon the evidence of the Defendant: but the Kings Council ſhall not be enforced to joyn in Demurrer; but in that Caſe, the Court may direct the Jury to find the ſpecial matter. So that the ſeveral ſorts of evidence make no difference, as to the joyning in Demurrer. 1. part *Leon.* 206.

Darroſe againſt Newbott. Cro. 4. Car. fol. 143.

In Error of a Judgment in *Bridgewater*: The Error aſſigned was, for that, in an Action upon the Caſe ſur *Aſſumpſit*, the parties being at iſſue, a demurrer was joyned upon the evidence, and thereupon the Jury diſcharged, and afterwards judgment was given for the Plaintiff, and a Writ of Inquiry of damages awarded, and damages found, and judgment thereupon: where the Jurors which came to find the Iſſue, although by the Demurrer they were diſcharged of the Iſſue, yet ought to have aſſeſſed damages conditionally, if judgment ſhould be given for the Plaintiff. And in proof thereof was cited *Newis* and *Scholastica's* Caſe in *Plow. Com. fol. 408.* and the old Books of Entries, &c. And it was ſaid by the Court, If theſe Precedents be good Law, then it may be inquired of by the ſame Jury conditionally: But it may be as well inquired of by a Writ of Inquiry of damages, when the Demurrer is determined: And the moſt uſual courſe is, when there is a demurrer upon evidence, to diſcharge the Jury without more inquiry. But as My Lord Chief Baron *Montague* held at the Aſſiſes in *Cambridgeſhire*, 1682. it may be one way or other.

In the Aſſiſe by *R. Newis* and *Scholastica* his Wiſe againſt *Lark* and *Hunt*, which was taken by default, The Precedent in *Plowd. Com.* as to this matter runs thus. *Recogn' Aſſiſæ pred. exacti venerunt, qui ad veritatem de premiſſis dicend. electi, triati, & ſarati fuerunt, ſup. quo Willielmus Bendlows Scrivens*

viens ad legem de consilio predictorum R. & Scholasticæ in manutentione Assisæ pred. coram Justic. Dominæ Reginæ de Banco hic in evident. Recognit. Assisæ pred. dixit, quod diu ante diem impetrationis Assisæ pred. quidam *H. Clark* fuit seiscitus, &c. Et condidit testamentum & ultimam voluntatem suam in scriptis, inter alia, unde pars inde in hiis Anglicis verbis sequitur, videl. *Also this is the last Will and Testament of me the said Henry Clark, for and concerning, &c.* Et ulterius idem Serviens ad legem ex parte pred. R. & S. dedit in evident. eisd. Recognit. quod, &c. Quorum pretextu idem jam Serviens ad legem exigit quod iidem Recogn. Assisæ pred. Assisam pred. de tenementis pred. cum pertin' in visu, &c. pro parte ipsorum R. & S. triari & comparere debeant, &c. Et veredictum suum dare debent quod. pred. *W. Lark* & *J. Hunt* dictos R. & S. de tenementis pred. cum pertin' in visu, &c. disseisiverant, &c.

Et pred. *W. Lark* & *J. H.* in propriis personis suis dic. quod evidentiæ & allegationes pred. ex parte pred. R. & S. superius allegat. minus sufficien. in lege existunt ad manutenend. Assisam pred. ad quos ipsi necesse non habent nec per leg. terræ tenentur respondere unde pro defectu sufficien. evident. in hac parte pet. iudicium quod juratores pred. de veredicto suo in premissis dicend. exonerentur, &c. Et quod pred. R. N. & S. ab Assisa sua pred. habend. precludantur, &c.

Et pred. R. & S. dicunt quod ex quo ipsi sufficien. materiam in manutentione Assisæ pred. in evident. recognit. pred. ostend. quam quidem materiam pred. *W. Lark* & *J. Hunt* non dedicunt nec ad eam aliquallit. respond. petunt iudicium Et quod iidem Jurator. inde exonerentur, & quod pred. *W. & J.* de Assisa illa convincantur, &c. Sup. quo dict. est Recogn. pred. quod inquir. quæ dampna pred. R. & S. sustinuer. tam occasione disseisinæ pred. quam pro misis & custagiis suis per ipsos circa sectam suam in hac parte apposit. si conting. iudicium pro eisdem R. & S. in placito pred. sup. evidencias pred. reddi Qui quidem Recogn. dicunt sup. sacram. suum quod si conting. iudicium in placito pred. pro pred. R. & S. sup. evidencias

denias pred reddi, iidem R. & S. sustinuer. dampna occasione disseisinæ pred. ad 13 s. 4 d. & pro misis & custagiis suis ad 20 s. Et quia Justitarii hic seadvifare volunt de & sup. premissis priusquam iudicium inde reddant, dies datus est partibus predict.
&c.

Note, several Exceptions were taken to the manner of giving the Evidence: First, for that the intire Will was not shewed, but part, and that this being the foundation of the Evidence, the whole Will ought to have been shewed; for there might be some other matter of substance, as a Condition, Limitation, *&c.* in the parts not shewed. But all the Justices disallowed this Exception, and said, the party, in any Title or Bar, needs shew no more, than what makes for him. As in an Act of Parliament, in which are divers branches, 'tis sufficient to shew that branch which serves ones purpose; and not like the Case of a Fine or Recovery of 20 acres, where I must shew the whole Record, although I am concerned but in one acre, because the Originial is intire, and so is the Record grounded upon it. See also *Fulmer-ton* and *Stewards Case. Plo. Com. 102.* Another Exception was, That the fine was not shewed under the Seal of the Court, or the Great Seal but one part indented of the Chirograph was only shewn, which the Jurors were not bound to believe, because it wanted a Seal. But all the Justices were against this, and said, the Jury might find the Fine of their own knowledge, without the shewing of the parties; or they might find it upon the Credit of any Witness that had seen it, and the shewing the part indented, is the usual evidence of a Fine. (Note, a Fine indented and not exemplified under Seal, *&c.* shall not be delivered to the Jury, 34 H. 6. 25.) And they said, because it is only the Inducement of the verity to the Jurors, the party could not Demurr upon this; for the effect of the matter is, that there is such a Fine which is amongst the Records. And this is the substance of the matter, and the part of the Chirograph is nothing but the Image of the verity, and there-
fore

fore there could be no Demurrer upon this.

Another Exception was, that the Recovery was not shewed under Seal, or at least that the Roll of this ought to be alledged certainly; but all the Court (except *Harper*) answered, that upon the general Issue; the Jury might find things that proved or disproved the seisin or disseisin, be they matters of Record or otherwise, and the Jury could not give a rightful verdict, if they could not find them, and whatsoever they may take Conuſance of themselves, may be given in evidence by words, or Copies, or other argument of the truth. 'Tis true, in pleading, a man cannot make a title by Record, without shewing the same under the great Seal, and if a Record be pleaded in Barr, a day may be given to bring in the Record under the Great Seal; but such day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be found upon pain of an Attaint to find it, if it be not shewed them under Seal: But nevertheless they may find it, and they do well, if it be true. And by the same reason that they may find it, they may take instruction of it by any circumstance, which induceth the truth. (Note if it be not necessary to shew the Record, and the Jury may find it without; yet 'tis not fit to be permitted to prove it in such a manner, without shewing the Record or a true Copy of it.) And the Demurrer upon evidence goes to the Law upon the matter, and not to the verity, which is admitted, and the effect in Law is denied, for if the party will not confess the truth of the matter given in evidence, then he ought so to say, and put it to the Jury to be tryed, and if they find this, where it is false, an Attaint lies: But a Demurrer upon evidence never denies the truth of the Fact, but confesses the Fact, and denies the Law to be with the party, which shews the Fact.

As to a fourth exception, for want of alledging and averring that *H. Clerk* had not any other Issue male than

Stiles 22.
White and
Pindars Case.

vid. Rolls tit.
Tryal 678.

than *John* and *F.* (upon a Limitation of a Remainder for want of Issue male of *H. C.* and a title made to the Plaintiffs Wife under that Limitation :) The same Judges answered, that which the Plaintiffs gave in evidence, is to the intent to perswade the Jury, that they have a good title, and what they say shall be applied as they intended ; and as by presumption no man will say any thing against himself, so it lies on the other side to shew what is against him ; and although in pleading, certainty ought to be shewed, (to which the other parry must answer, and upon which the Court may judge,) yet in evidence so great and exact certainty is not requisite, for the Jury may found their verdict, (if the matter be ambiguous) upon what is most probable, and by the same reason that which is most probable, is good evidence, and therefore it shall be intended that *H. C.* had no other Issue Male, because the other parry did not shew that he had.

The Precedent of a Demurrer upon evidence in *Reniger* and *Fogassa's* Case, in *Plo. Com.* fol. 1. In an information upon a seizure of Woad imported, the Customs not being paid, nor any agreement made with the Collector in the *Exchequer*, where the Issue was, whether the Defendant made an agreement with the Collector of the Subsidies for the Woad according to the Act, &c. or not.

Ideo fiat inde inquis. ac pro eo quod idem *A. Fogassa* est alien. natus, videlt. apud civitatem portus Portugalix in Portugalia sub obedientia pred. Portugalix Regis, petit medietatem linguæ suæ, &c. *A. B. E. M. R. S. &c.* qui ad veritatem de premissis dicend. electi, triati & jurati Dicitur *A. F.* in manutentione exitus pred. superius ad patr. juncti, & ad proband. exit. ill. pro parte ipsius *A.* fore verū produxit pred. *Tho. Wells* Collect. Custum & Subsid. Domini Regis in portu villæ *Southampton* ac *J. S.* adtunc & adhuc Clericum sive servient ipsius *Tho. Wells* in dicto offic. Collect. pred. nec non quendam *J. D.* Yeoman ad testificand. premissa in placito ipsius *A.* spec. fore vera. Qui quidem *Thomas Wells* examinatus sup. Sac. suum

suum coram Baronibus hic prestitum in premissis, dicit, quod, &c. (*here recite the Evidence.*)

Et pred. Attorn. Domini Regis pro eod. Domino Rege dic. quod evidentiæ pred. superius dat. minus sufficien. in lege existunt, ad manutenend. seu proband. exit. pred. pro parte ipsius A. F. superius ad patriam junct. unde ob insufficient. earundem evident. ac ex quo per evidencias illas non deditur forisfactura bonorum pred. in informatione pred. spec. i em Attorn. Domini Regis pro ipso Domino Rege petit iudicium ac quod eadem bona remaneant Domino Regi forisfacta juxta formam statuti pred. Et pred. A. F. dic. quod evidenciæ pred. superius ex parte ipsius A. F. dat. sufficien. in lege existunt tam ad manutenend. & proband. exit. pred. pro parte dicti A. F. superius ad patriam junct. quam ad excludend. Domini Regem de aliqua forisfactura bonor. pred. habend. Ad quas pred. Attorn. Domini Regis, pro ipso Domino Rege minus sufficienter respondit, nec aliquod pro ipso Rege allegavit; unde idem A. pet. iudicium ac quod pred. bona in dicta informatione spec. ei reliberentur, quodque ipse quoad premissa ab hac Curia dimittatur. Ideo ad iudicium.

Note, In this Case, the agreement according to the Statute, was put in Issue generally, and yet the special agreement maintained the Issue.

Regula.

And wheresoever the Evidence do. h not warrant, prove and maintain the v xy same thing that is in Issue, that Evidence is defective, and may be Demurred upon.

Non est factum.

Upon non est factum to a Bond dated at York: It was said, in this case, that, to prove the Bond made in another place. doth not prove the Bond nor Warrant the Issue, because the delivery is intended to be where the Date is; but the Witnesses prove the contrary, and so the Issue is not proved: But surely if this be found, the Plaintiff shall have Judgment as well as upon a Bond delivered before the date. 31 H. 6. Pl. 7. Rolls 677. But infancy, or made by Dures, cannot be given in evidence upon non est factum, lib. 5. whelpdales Case, 119. because thereby the Bond is not void but only voidable: Otherwise of the Bond

Bond of a *Feme Covert*, or *Monk*, for there the Bond is void, and so *non est factum*; and so of a Bond made to a *Feme Covert*, and the Husband disagree to it, or by Husband and *Feme*, *Non est factum* of the Wife.

In an *Affise* if the Tenant plead *Nul tort, nul disseisin*, he cannot give in evidence a release after the disseisin; but a release before the Disseisin he may, for then there is no Disseisin upon the matter.

Release.

In a *Writ* of Right, if the Tenant joyn the *Mise* upon the meer Right, he cannot give in evidence a Collateral Warranty, for he hath not any right by it, and therefore it ought to have been pleaded. 1. Inst. 283.

Warranty.

Regularly, whatsoever is done by force of a Warrant, or Authority, ought to be pleaded.

Regula.

But, Note, in all Cases where one cannot have advantage of the special matter, by way of Plea, there he may have advantage of it in evidence: as for example, The rule of Law is, That one cannot justify the Death or Killing of a man; and therefore if one kill another in his own defence, he cannot plead this specially; but he may give it in evidence: and so in defence of his House, against Thieves and Robbers, &c.

By the Statute 23 H. 8. cap. 5. any thing done by the authority of the Commission of Sewers, may be given in evidence upon the general Issue.

Sewers.

After taking the General Issue, the Defendant cannot give in evidence any thing that goes in discharge of the Action; as in Debt upon *nil Debet*, he cannot give in evidence a Release, nor a grant to cut Trees, to repair upon *nil wast fait*, nor making of a Ditch to amend the Meadow: but that he only lopped the Trees, he may, if wast be Assigned in *succidendo Arbores*, &c. Neither if a Statute was made that all Tenants for life should be punishable of wast, could he give in evidence this Statute. 28 H. 8. Dyer 28. for the discharge ought to be pleaded, because it admits a Cause of Action without it.

Regula.

Release.

Wast.

Statute.

In Debt against Executors, and *Assets intermaris*, in Issue, 'Tis good evidence that they sold Land, by the Will

A Tets.

Will of the Testator, &c. and that they had the money. And so that they recovered Damages in Trespass for goods taken in the life of the Testator, &c. 3 H. 6. 3.

Villénage.

In an Issue upon Villénage regardant to a Mannor, a Villain in gross, is no evidence, Dyer 48.

Attornment.

Ini wast by the Grantee of a Reversion, by Montague and Fitz. The Lessee may plead that he in reversion *ne grant a pas per le fait*, and give in evidence, that he never attorned, or he may Traverse the Attornment at his election, Dyer 31.

Trespass.

In Trespass, *Quart clausum fregit*, the Defendant says that *locus in quo*, &c. is 6 Acres in D. which is his Freehold : the Plaintiff replies that it is his Freehold, and not the Defendants : The Defendant cannot give in evidence, other 6 Acres in D. which are his Freehold, because the plea shall be intended to refer to the 6 Acres of the Plaintiffs, Dyer 23.

Rescous.

In Rescous by the Lord, upon not guilty, the Defendant shall not give in evidence, that he doth not hold ; by *Vavasour and Bryan* : and so if he said *nothing is behind* in avowry, he shall not give in evidence that he doth not hold of him. T. 9 H. 7. 3.

Avowry.

Fcoffment.

In Aflise, Fcoffment pleaded, the Plaintiff says, he did not *enseoff modo & forma* upon the Deed and Letter of Attorney to Inseoff upon condition found, if the Attorney made it without condition, this well proves the Issue for the Plaintiff, 13 E. 4. 4.

If one plead a Fcoffment of a Joinment to his Companion, or of a *Feme Covert*, the other may say *ne enseoffa pas*, and give the matter in evidence ; and the Court shall instruct the Jury of the Law, 18 E. 4. 29.

Regula.

upon the general Issue, any thing may be given in evidence, which proves the Plaintiff had no cause of Action.

Trespass.

Trespass by the Warden of the Fleet, upon not Guilty, you may give in evidence, that he is not Warden, 4 E. 4. 7.

So in Trespass of a House, that he had no house there, or the Freehold of another, and not of the Plaintiff, is good evidence upon not Guilty : but in Trespass of Goods, 'tis no good Plea to say, the property

perty was in another, although it is in a Replevin; and therefore it seems to be no good evidence in Trespass, because possession maintains the Action against all but the owner; but that the property was in a stranger, and he gave them to the Defendant, is good. See before cap. Evidence, 27 H. 8. 25. But in Trover, that they were not the Goods of the Plaintiff, is good evidence, 5 H. 7. 3. Trover.

Cessavit, &c. Count, that of diverse Lands held by entire service, upon non tenuit modo & forma, held by several services, is good evidence, for he had no such cause of Action, 10 H. 7. 24. Cessavit.

Upon the general Issue, for the Defendant by evidence to convey to himself the same interest and Title, is good evidence. Regula.

As in Trespass of Goods, Not Guilty, and evidence, that he had a lease of that Wood for Years where they were taken, is good, for it is his Title, 16 E. 4. 2. Trespass.

Account of Receipt, by the hands of J. S. the Defendant pleads *Ne unques son Receiver*, and evidence, that J. S. gave this to him, is good, 2 H. 4. 13. So in Trespass, a Lease for Years, Tenancy at Sufferance, (but not at Will) That they were a strangers goods, who gave them to the Defendant, is good evidence, upon Not guilty. 22: Ass. 73. because by these matters he makes himself a Title, & sic de ceteris. Account.

Upon the general Issue, if by the evidence the Defendant acknowledge that he did the wrong, and justify this, and gives matter that goes to discharge him of the act by Justification, this evidence is not good, but he ought to have pleaded it. Regula.

This rule is demonstrated, by those Cases where upon Not Guilty, in Trespass, the Defendant would say, the property was in a stranger, and that by his commandment, or as his Servant, he took the goods. Not Guilty, and that he did the Battery *se defendendo*. Not Guilty in maintenance, and lawful maintenance. Insufficiency of Mounds. The Freehold of a stranger, and his Licence. A former recovery in another action. So for Common, Rent-service, Rent-charge,

charge, Licence, &c. cannot be given in evidence upon the general Issue, for these matters in evidence are justifications, which go in discharge of the party, but not by Title, but by justification.

So where an Imprisonment or entry is given by authority of Law, or by authority from any party, as for an imprisonment, by the Statute of Trespassers in Parks, putting a man off his ground, thrusting a man out of Church that troubles the Congregation in service, parting an Affray, and keeping the Quarrellers apart, in defence of himself, or his, Entry in perambulation, Entry to amend his Gutter leading to his house, as of ancient time had been used. That it was a Common Inn. That he put in his Cattle by the Plaintiffs agreement. That he entered and took the Emblemeats after the death of the Tenant for Life. That the Plaintiff owed him money, and by his invitation he went into his house to receive it. That he took the goods, as a Harriot, Waif, Estray or Wreck. Or the Plaintiff took away the Defendants Cattle and he entered into the Close where they were, and took them again. That he took the Cattle damage feasant in his ground, or for an Amercement in a Leer, &c. That the goods were the goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him: That he took them by a writ. That as Schoolmaster he gave moderate Correction. These are excuses and justifications without Title, and therefore must be pleaded, and cannot be given in evidence upon *Not Guilty*.

So in an action *de malefactoribus in parvis*, he cannot plead *Not Guilty*, and give a Licence in evidence. So in an Appeal, if he plead *Not Guilty*, and shews that he was Sheriff, and executed his Office; or that he was Foster, and killed him because he fled, and would not submit. *vide 12 H. 8. fol. 1.* The best Case of this matter.

Evidence which is contrary to that in Issue, or which is not agreeable to the matter in issue, is not good. Regula.

As appears, by several Cases, which you may find in the Chapter of Evidence. As upon the Issue, *nothing passes by the Deed*, you cannot give in evidence, that it is not your Deed, for this is contrary to the Issue, and to that which is acknowledged in the plea by implication, 5 H. 4. fol. 2.

And so upon Not Guilty, in assault and Battery, and evidence that it was done in his own defence, is not good.

And so in debt upon a Bail-bond, you must plead, that there is not the name of Sheriff in it, *Et issint-nient son fait*, and cannot give it in evidence upon *non est factum*, for it is contrariant, 5 E. 4. 5.

So upon Issue of Common appendant, Common *pur cause de vicinage*, is not agreeable to the matter in Issue, and therefore cannot be given in evidence, 13 H. 7. 13.

Where the evidence proves the effect and substance of the Issue, it is good. Regula.

As to prove a Grant or Lease pleaded *simplement*, a Grant or Lease upon condition, and the condition executed, is good, for this proves the effect and substance of the Issue, 14 H. 8. 20. so a promise to the Wife, and the Husbands agreement proves a promise to the Husband, and this you may see in many Cases, in the Chapter Evidence.

In Trespass for goods taken, the Defendant, upon Not Guilty, in mitigation of Damages may give in evidence, that the Plaintiff had his goods again, 11 H. 4. 24. 19 H. 6. 34.

Justifiable maintenance cannot be given in evidence upon the general Issue, but must be pleaded. The Master may justify for his Servant. Any man for his kindred, &c. or to give money to the Poor, &c. But that he was of his Counsel, may be given in evidence upon the general Issue, for to give Counsel, is not maintenance. 22 H. 6. 35. 28 H. 6. 6.

Upon this Issue, the Defendant may give in evidence, that he is a Lay-man not lettered, and that it

Other cases of evidence.

Trespass.

Maintenance.

Non est factum.

A witness
may prove
the contents
of a Deed, or
Will. *Vaugh-*
ans Rep.
77.
Prescription.

it was read to him in another form, 15 E. 4. 18. but it is the best way to plead it, for the understanding of the Jury, 39 H. 6. 9. Bro. Waiver 2.

In an Issue upon a prescription Traversed, the Plaintiff gave in evidence a Deed bearing date after the time of limitation, *scil.* After the time of R. 1. And the Defendant would have demurred in Law upon it, and well he might, *per Cur.* Whereupon the Plaintiff would not give this in evidence, but gave other evidence, 34 H. 6. 37. See Chapter Evidence, fol. 230. where a Grant shall be taken as a Confirmation of a Prescription.

Note the opinion, 12 H. 4. 21. That a Deed made before the time of memory, may be given in evidence, although it cannot be pleaded.

Antient
Deeds.
False impri-
sonment.

Upon Not Guilty, the Defendant gave in evidence, that by the Plaintiffs agreement he carried him from D. to S. and held good, because, what is done by the Plaintiffs agreement, is no Imprisonment. 14 H. 6. 2.

Upon Not Guilty, the Defendant said, his Master locked the Plaintiff into a Chamber of his House, and gave the Defendant, being his Servant, the Key to keep. 22 E. 4. 45.

Sow pigged,
being taken
in Distress.

Vide Repl. in Fitz. 34. Repl. of a Sow and Piggs, the Defendant justified for the Sow, and to the Piggs, pleaded he did not take them; the Jury found, that the Sow was with Pigg, when she was taken, and afterwards cast her Piggs, in the Custody of the defendant; and the Plaintiff recovered Damages, for says Bro. Aridg. tit. General Issue, 88. This is a special taking in Law.

Dower.

Dower of rent. *Hill. ne unque seisie que Dower la poit.* Horton J. S. granted the rent to the Husband, payable at Michaelmas next, and the Husband dyed before the day, and so he was seised in Law, and demanded judgment. *Thirm.* You shall say generally, *quod seisie que Dower la poit*, and give your Case in evidence, *Et sic bine* notwithstanding the doubt of the lay Gents; for they ought to credit the Law, and evidence is not to be pleaded. 11 H. 4. 88.

Tenant

Tenant for life leaseth for years, who is ousted, and the Tenant for life is disseised; The disseisor leaseth for years, who sows the Land; The Tenant for Life dies; he in remainder in Fee, brings Trespass against the Defendants claiming the Emblements by the Lessee of the Disseisor. Adjudged, that they had not the meer right, but in respect of their possession, they should barr the Plaintiff, who had no right: and that the meer right was in the Lessee of the Tenant for Life, and that he might bring Trespass against the Lessee of the Disseisor, and recover all the mean profits. But as to the entry into the Land to take the Emblements, this was good matter of justification; but in regard it was not pleaded, it could not be given in evidence upon Not Guilty; and therefore the Plaintiff had judgment for the entry, and was barred for the residue. Note that the Lessee of Tenant for Life had right to the Land, and by consequence to the Emblements, as things annexed to the Land, and the death of the Tenant for Life determines his interest to the Land, but his right to the Emblements remains.

Emblements.
Knivets Case.
lib. 5. 85.

It sufficeth to prove the substance, without any precise regard to the Circumstance. As if an Indictment be, that with a Dagger the offender gave another a mortal wound, &c. and in evidence it is proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the offender upon this evidence ought to be found guilty: For the mortal wound is the substance, and the manner of the Weapon is but the Circumstance; yet some Weapon, ought to be mentioned in the Indictment. And so if A. B. and C. be indicted for killing of J. S. and that A. stroke and the other were Abettors; To prove that B. stroke is sufficient, &c.

Regula.
Substance.
Circumstance.

Manslaughter upon an Indictment must be found, if proved, because the killing is substance, upon which judgment shall be given.

Indictments for Murder of Ministers of Justice, in execution of their Office, may be general, viz. that the prisoners, felonice, voluntarie & ex malitia sua

sua præcogitata, &c. per cusserunt, &c. without alledging the special matter, which may be given in evidence, for the Law implies malice *prepensèd*. So if a Thief in robbing kills the man that resists him, or a man is killed without any provocation, or without malice *prepensèd* that can be actually proved, the Law adjudges this murder, and implies the malice; and in these Cases, the offenders may be indicted generally, that they killed of malice *prepensè*, for the malice implied by Law, given in evidence, is sufficient to maintain the general Indictment. *lib. 9. 67. Machallyes Case.*

So of an Indictment as accessary to 2. to prove accessary to 1. is sufficient. *lib. 9. 119.*

In *Cromwells Case, lib. 4. 12.* Although it was objected that in an Action of slander, If the Defendant will justify, he must justify the same words & in the same sense, as it is laid in the Nar. or else he must plead, Not Guilty, and give the special matter, that is the variance in evidence. Yet the Court held, that the Defendant should not be put to the general Issue, but might justify, although he varied from the Plaintiff in the sense and quality of the words: and might set forth the coherent words. As for calling the Plaintiff *Murderer*, the Defendant may shew that they were speaking of Hares, and the words were spoken in reference to killing of Hares.

Upon the Issue, if the Lord of the Mannor granted the Lands, *per copiam rotulorum Curie manerii pred. secundum consuetudinem manerii pred.* To prove that there were customary Lands in the Mannor, and that the Lord of late granted the Land, &c. *per Copiam rotul. Curie*, where it was never granted by Copy before, is no good evidence to find the Custom, or that the Lands, &c. were grantable or demisable by Custom. *Leon. 55. Kemp and Carters Case.*

Forger of a Deed, in which is contained a demise of the site of the Mannor of R. and terras dominicales, &c. A Deed of the site, and all the Demesnes of the said Mannor, *Exceptis duabus clausuris, &c.* is good evidence, for it is not necessary to construe terras dominicales, &c. omnes terras dominicales, &c. for Lands

Copyhold.
In *Pilkintons*
Case. Stiles,
450.
Rolls said,
If Copies of
Court Roll be
shewed to
prove a Customary
Estate, the enjoyment of
such Estates
must also be
proved, otherwise the
proof is not
good.
Forger.
Totum & pars.

Lands not excepted are *terra dominicales*, and so the Court is satisfied by that evidence. *Leon* 139. *Atkins and Hales Case*.

Debt against an Executor, upon *plene administravit*, it appeared, that the Executor meddled, and administered, and then refused in Court, and administration was granted to another; and that several summs were recovered against the Administrator; it was said by *Periam* Justice, 1. That if an Administrator (who is a stranger) administer, without the Commandment of the Executor, the Executor cannot give such administration in evidence, to prove his Issue. 2. That in the principal Case the Executor having administered he could not refuse, and so the administration is granted without cause, and what he did was without warrant, and no administration. *Leon*. 134. *Hamkins and Lawse Case*. At *Bury* Assises 1682. before Judge *Windham*, The Executor gave the administration of the Administrator in evidence, and allowed; but there, what the Administrator did, was by the Executors consent, in *Mr. Luns* and his Mothers Case.

Plene administravit.

An Executor *de son tort* cannot give in evidence his retaining of goods to pay himself, for he cannot retain; but if he takes out letters of Administration (although) *pendente lite*, he may retain for a Debt of as high a Nature and plead this in Barr, for the administration purges his wrong, and although he shall not abate the Writ by taking out Letters of administration, yet he may plead this in Barr. *Stiles Reports*. 338.

Plene administravit.

An Executor pleads *plene administravit præter a* judgment, replication, and Issue, that the judgment was

fraudulent. The Obligee who had the judgment, was denyed to have evidence about his Debt, for he sweareth to have Assets for himself; and is interested in the thing. Before Judge *Windham*, at *Bedford* Assises, 1682.

In a *Replevin*, the taking was supposed in *R.* The Defendant said that the place where, is 40 acres, parcel of the Mannor of *R.* which is his Freehold, and avowed for Damage-feasant; The Plaintiff said, that

No evidence to be given against what is admitted upon the Record

Note *Leon 3.*
part 210.

If the parties
admit a thing
per nient dedi-
re, the Jury
is not
bound by it ;
but where
upon the
pleading a
special matter
is confessed,
the Jury shall
be bound by
it.

Impropriati-
on.

Hors de son
fee.

the place where, is parcel of the Mannor of *R.* in *R.* and conveyed title to himself in that ; *Absque hoc*, that the Mannor of *R.* *unde* was the Freehold of the Defendant. It was the opinion of the Justices, that the Plaintiff is estopped to give evidence that the Defendant had not any Mannor of *R.* for the words *absque hoc* and *unde* imply he had such a Mannor, but he ought to have taken it by protestation, that the Defendant had no such Mannor of *R.* in *R.* *absque hoc* that the 40 acres was the Freehold of the Defendant, *Dyer 183.*

Trespass, concerning the Rectory of *Norton Pinkney*, which belongs to *Oriel Colledge in Oxford*, The Issue was, if there was a Vicaridge indowed there, or only a stipendiary Curat.

1. All agreed, that if a Vicaridge be erected and established, if there was no Endowment *de facto* of the Vicaridge, the Vicar could not claim any thing.

2. There was shewed an Impropriation, by the Licence of the Pope made in the time of *E. 2* *Doderidge* said, that was not good, *Jones è contra*. And it will be perillous to such ancient impropriations, if now the consent of the King must be shewed ; and at that time it was taken good by the assent of the Pope, without the King. *Dod.* denyed that the Pope without the King at that time could make an impropriation with the Ordinary and Patron. But *Crew* agreed with *Jones*. And in things of such antiquity *omnia præsumuntur solemniter acta*, and said, that so it was ruled in a case before : And *Jones* said it was nothing to the Vicar, for the Vicaridge may be endowed without the consent of the King, and 'tis not *Mortmain*. *Palmer's Reports 427.* *Erasmus Copes Case* against *Bedford*.

Where *hors de son fee* is pleaded, a release of the Seigniori is good evidence. *8 E. 2. Fol. 262.* •

In debt for Rent upon a Lease for years, the Issue being joyned, if the Rent was paid or not, the Defendant gave in evidence, for part of the Rent, That the Plaintiff was by covenant to repair the House,
and

Debt for rent.

and did it not, and thereupon he expended the Rent in repairing the house, and the question was, if this evidence will maintain the Issue. *Gawdy* conceived it did, for the Law giveth this liberty to the Lessee to expend the Rent in reparations, and *recoup* the Rent, *V. 12 H. 8. 1. Fitz. tit. Bar. 242. 14 H. 4. 27. Fenner*, It is no evidence, for if the Lessor will not repair it, the Lessee may have his covenant against him. *Cleach*, seemed he might well expend the Rent in reparations, but he ought to have pleaded it, and cannot give it evidence upon the general Issue, and thereupon they moved the Jury to find the special matter.

So that it seemed to the Justices, that the Defendant had liberty to expend the Rent in the reparations (they being to be done at the Plaintiffs cost) but then that he ought to have pleaded this matter, as it was done in (almost) the like case. *Fitz. tit. Bar. 242*. Yet why might he not give it in evidence upon the general Issue? for if the Law allows this to amount to a payment of the Rent, then the Defendant owes nothing, which maintains *nil debet*, and I think the other book of *14 H. 4. 27.* rejects this sort of special plea, upon this reason, that the Plea amounted to the general Issue: But there indeed the Rent was pleaded to be laid out at the Plaintiffs command, here only by authority in Law. I should be glad if any one would reconcile those two Books better, I know there is another reason in the Book, (and assigned by Rolls in his Abridgment of the Case) why the Plea was rejected, *viz.* that the duty was acknowledged by the Plea, and therefore the matter of the plea not good, without shewing a Deed of it, but I should have been better pleased with him, if he had assigned the other reason, *viz.* that it amounted to the general Issue. Which made *cheyne* that he durst not joyn in demurrer. For 'tis not pretended in either Case that the Deed ordered the Rent to be laid out in the repairs.

And in that Case in *F.* where there was no express order of the Plaintiff; it may be the Judges allowed the special matter to be pleaded, because

the Jury should not be intrusted with the Law upon the general Issue, which may be said for the special pleading this matter in our Case, although it may amount to the general Issue.

Reparations.
Vide the
Cases of Re-
couper. lib. 5.
30.

But as to the residue the Defendant shewed, he paid it to others by the Plaintiffs order, which was held clearly good, for what is paid by the Lessors appointment is a payment to himself. *Cro. Eliz.* 223. *Taylor against Beal. vide Rolls tit. Debt* 605. 34 H. 6. 17. *Bro. Debt* 27.

Estoppel.

Where a man is Estopped in pleading to speak against his own deed, yet he shall not in evidence; As in *Ishams Case* against *Morris Cro. 4 Car.* 109. upon evidence at Barr, It was held by all the Justices of the Common Pleas, That where one makes a Lease for years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Lease for years, by Estoppel against him and his Assignee, by way of pleading, and shall bind them, yet it shall not bind the Jury, but they may find the truth, and if they find the truth, the Court shall adjudge it to be a void Lease. *vide tamen Rawlin's Case lib. 4. 53. Sut. on and Dickens Case Leon. 1. part fol. 206. 1 Inst. 47. 227. Edwards against Omellhallum. Marsh. 64. James and Londons Case. Cro. 27. Eliz. fol. 35. Leon. 3. part 210. Bulstr. 2. part 41.*

Note, That if a Demurrer be made upon the evidence, the evidence ought to be entered *verbatim*. *Keilway* 77. Where in account, against one generally as Baylist, the evidence that charged him specially by reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage.

Matter of Surplusage shewed in evidence shall not hurt. *Keilway* 166.

Will.

Issue was upon a devise to *A. Harding* and her Heirs, *modo & forma*, and the Will given in evidence was *A. H. shall have all my inheritance if the Law will allow it*, and held sufficient to maintain the Issue, *Hab. 2.* so upon *Ne unques receiver per maines J. S. a delivery from J. D. by the appointment of J. S.*

Account.

to the Plaintiffs use, is good evidence. *Hob. 36.*

Issue whether *A.* was taken by a *Capias ad sat.* at the suit of *B.* and evidence of a taking at the suit of *C.* and then a delivery of a *Capias ad sat.* at the suit of *B.* to the Sheriff is good. *Hob. 55.* But a taking upon a *Cap. utlagat* or *cap. pro fine*, with a prayer of the Plaintiff that he may remain for his satisfaction, is not. *Ibid.*

Arrest.

In a *consimili casu*, where the demandant counts of an alienation in Fee, yet the Defendant shall make his Traverse to the alienation *modo & forma*, and then the demandant shall maintain the Issue by an Alienation in Fee, or in Tale, or for Life, for they are all alike material. *Hob. 105.*

Consimili casu.
Substance.

In an Assise the Defendant pleaded the Deed of the Brother of the Plaintiff with Warranty, A Deed of the Father with Warranty will not maintain the Defendants Issue. *Hob. 55.*

Warranty.

In *Bennets Case Stiles 223.* In a Tryal at Barr, It was said by the Court, that if either of the parties to a Tryal desire that a Juror may give evidence of some thing of his own knowledge to the rest of the Jurors, that the Court will examine him openly in Court upon his Oath, and he ought not to be examined in private by his Companions. And it was also said that if a Robbery be done in *crepusculo*, the Hundred shall not be charged, but if it be done by clear day light, whether it be before Sun rise, or after Sun set it is all one, and the Hundred shall be charged.

Juror.

Robbery.

In an action of the Case for digging a hole in the High-way, into which his Gelding fell, &c. upon Not Guilty, this evidence was given that the Plaintiffs servant was driving the Plaintiffs Gelding in the way, and that by reason of the hole he fell, &c. Upon which it was demurred, because it was not proved that there was such a High-way, nor who digged the hole. *Roll Chief Justice*, This evidence is no more than a special Verdict, and it ought to find the way and the hole digged and all the matter conducing to the Issue, and therefore it is not good as it is: and a *venire de novo* was awarded. *Stiles*

Demurrer
upon evi-
dence.

Action sur
Case.

Demurrer
upon evi-
dence.

Record.

Deed.

Record.

In Trover and conversion, there was a Demurrer joyned upon the evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, it upon the argument of the Demurrer the Law should be adjudged for him, and then the parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the Law upon the evidence. In this Case Roll Justice took this difference: If a record be pleaded it must be *sub pede sigilli*, or else the Judges cannot judge of it: But it may be given in evidence, and the Jury may find it, though it be not *sub pede sigilli*. And the Court advised the parties, for their own expedition, to let a *venire facias de novo* be issued out, and to wave the Demurrer upon the evidence, because it was not good, nor could not bring the matter in question before them, that they might determine it; for one party saith there is a Writ, and the other saith, there is not a Writ, which is bare matter of fact for the Jury to determine, and not for the Court, and the Demurrer ought to have been, whether the Writ be good, or bad, and should have admitted that there was a Writ *siel quel*, and then had the whole matter come legally before the Court, to wit, whether the evidence given to the Jury be sufficient for them to find a verdict for the Plaintiff upon the Issue joyned or not. For the matter of fact ought to be agreed in a Demurrer to an evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, if a Deed be pleaded, the party must shew it in Court, but in evidence 'tis not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and so it is of a Record: and concluded, that the Demurrer was not good, and that there ought to be a *venire facias de novo* to try the matter again. Bacon Justice said, there ought not to be a *venire facias de novo*, but that judgment ought to be given against one party, to wit, the Defendant, for ill joyning in the Demurrer, to the intent the party that is not in fault may be dismissed, and the parties here have waved the *Trial per pays*, by joyning in Demurrer. But Roll answered that

that no judgment at all could be given, for both parties be in fault, one by tending the Demurrer, and the other by joyning in it, and the Defendant might have chosen whether he would have joyned or not, but might have prayed the judgment of the Court, whether he ought to join. The Court advised to search Precedents, for a *venire facias de novo* after a Demurrer upon an evidence, and if there be any, they hold that the same Jury ought to come again, and not another. Roll said if a special Verdict be found insufficient, a new *venire facias* ought to Issue, and he saw no difference betwixt that and this Case. *Wright and Pindars Case, Stiles 22. and 34.*

In Debt for Servants Wages, viz. 20 s. or a robe yearly : The Defendant may plead payment of the robe, and shall not be put to the general Issue, where the payment is of another thing than money; but of money he must plead *nil deb.* and give the payment in evidence. And the Defendant may plead that the Plaintiff departed out of his service, and shall not be forced to the general Issue 9 E. 4. 36. Though surely that may be given in evidence upon *nil deb.* for the Plaintiff must prove he served : so *indebitatus Assumpsit & non Assumpsit* upon the promise in Law, an extinguishment, by taking a Bond (being a matter of a higher nature) for the Debt, may be given in evidence.

Debt.

Servants wages.

Extinguishment.

And Note, if an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy : Yet it seems the Contract shall not be revived. *Sed dubitatur, Rolls tit. Extinguishment 604.* for now, this Bond which was voidable, is become void, and a void thing shall not have such effect : But a personal action once suspended is gone for ever. But acceptance of a Bond shall not extinguish Rent, nor arrearages of an account before an Auditor of Record, because these are of a higher nature than the Bond, the Rent being real, and the other of Record. But the Bond extinguishes the contract, for the arrears upon an *In simul computasset, &c.*

Accep-

Acceptance.
Rent.

Acceptance of Rent due the last day, and an acquittance thereof, discharges all the arrearages due before. *lib. 3. 65.* Unity of possession, in as high an Estate destroys the prescription &c.

Trover.
Trespass.
Vide Rolls 1. part 1. 2. A custom pleaded in Trover to take Corn to repair a bridge, and *Cro. Eliz. 433. & 262.*

A seizure and condemnation in the Exchequer of forfeited goods, may be given in evidence upon Not Guilty in Trover, but it must be pleaded in Trespass. In Trover of a Horse, that he is a Common Hostler, and that the Horse was put to him at Livery and dyed, is good upon Not Guilty. *Rolls 1. part 22.*

Promise.
Imperfect
Issue.

Upon *Assumpsit* the Plaintiff declares upon two considerations, and a simple promise: If the Jury find but one, or a conditional promise, this doth not maintain the Issue for the Plaintiff. *Leon 173. Musted and Hoppers Case.*

Where the Issue is not perfect, no evidence can be applied, neither can the Justices of *Nisi prius* proceed to the Tryal of such an Issue. As whether the money was paid after the date of the Obligation, and the date was left out, and did not appear in the Record. *Brown 2. 47.*

Payment.

In Debt upon a Bond, conditioned to pay 20 s. at the house of the Defendant the 7. day of May, upon payment at the time and place: The Jury found the payment before the 7. day, and prayed the advice of the Court, if this was a payment at the day. The Court adjudged that the payment and acceptance before the day, was as well, as if it had been paid at the day. *Saviles Reports 96. Bond against Richardson.* And so *Sales Cook 1. Institutes 212.* The time and place are but circumstances, and if the Obligor or Feoffee receive the money at another place, or before the day, it is sufficient: Or a lesser sum before the day. But *More 47.* upon Issue of payment at the day and place, and evidence of payment a month before, and Demurrer upon the evidence. *Dyer, Brown and Wells*, said this evidence doth not maintain the Issue, because before the day of payment there is no duty, and the day and place are parcel of the Issue, and the act on one day, is not an act done on another day: As if an Executor pleads payment at the

the day, 'tis not good evidence to shew that it was paid before the day by the Testator, for this doth not prove the Issue, and yet there was not any duty remaining at the day, and therefore the pleading ought to have been specially according to the truth. *Vide devant* 198. And 'tis not like the Case, where the circumstances of time and place are put only for necessity of Tryal; but, in regard that payment is the substance; why is it not sufficient to prove, as well as to find, the effect and substance of the Issue? And 'tis not the case of collateral conditions, where the condition is not to pay money, but to do some Collateral thing, as to deliver a Horse, a Robe or Ring, &c. or to pay money to a stranger; such Collateral conditions are more strictly to be observed. *vide* 1 *Inst.* 212.

Note, if there be a Demurrer, yet there may be a plea *puis darrein continuance*, and if the Plaintiff take Issue or demur to this plea, yet the Court must also consider of the first Demurrer; for if upon that standing confessed by the Demurrer, the Plaintiff could not have his action, the Court cannot give judgment for him, howsoever the latter Issue or Demurrer pass. But otherwise if the first had been an Issue, for then nothing were confessed to his prejudice, and then that had been utterly relinquished by a second Issue, or Demurrer, *Hob.* 81. with a Quære, &c. When this plea is pleaded, the Justices of *Nisi prius* cannot proceed to take the Inquest, neither can the Plaintiff reply there; but in *Bank* *Bulst.* 92. 93.

Plea puis darrein continuance.

Per Doderige, In Trover and conversion of goods, if the Defendant derive a title from a stranger, this amounts to the general Issue, otherwise if from the Plaintiff. *Latth.* 186. And bayment of the goods to deliver to another, and delivery accordingly amounts to the general Issue, and may be given in evidence upon it. *Bulst.* 3. part 209.

Trover.]

In Trespass against two, for entering into the Plaintiff's Land, if one pleads his Freehold, and the other that he entered by the commandment of him that pleads it is his Freehold, here is to be but one Issue joyned,

Trespass.
Freehold.

viz

viz. by him that claims the interest, for upon that Issue, all depends: If it be found against him, his servant has no colour.

Averments. And in regard what may be averred, may be proved, and given in evidence; 'twill not be impertinent to draw a short scheme of Averments with which I will conclude.

Averment had upon or against a Deed.

To alter, qualifie, or abridge the operation of it if there be any apt words in the Deed, whereupon to ground it. As a grant to *A.* the Son of *B.* and he hath two Sons of that name, of the Mannor of *S.* and he hath two Mannors of that name, which Son or Mannor was intended, may be averred. And so may a consideration of a Deed that is besides, but not that is against the express consideration of the Deed: nor can any thing against the words of the Deed, either enlarge or restrain it.

Consideration.

Use.

Nor can a Use against or besides the express uses in the Deed; but where nouse is expressed, or incertainly expressed, it may, and also to reconcile a fine and the Indentures to lead the uses of the fine. *lib. 2. 75.*

But when a Deed is utterly incertain, no averment shall help it. As a grant to one of the Sons of *J. S.* To two & *heredibus*, &c.

Upon or against a Record.

An estate to a Woman for her life, may be averred to be made for her joynture. *Dyer 146. lib. 4. 4.* And that the thing granted to me by a new name is all one thing, with that which has another, or an old name. *Dyer 37. 44.*

A fine taken, by R.M. Esq; and returned by R. M. Militem, upon the Ded. p. the Record not to be averred against in Error. Yelverton 33. Cro. 2. part 11.

A thing that is against or besides a Record, or any thing that is within it, shall not be averred. Therefore the date of a Recognisance expressed to be taken at *Dale*, cannot be averred to be taken at *Sale*. But such an averment as may stand with the Record, may be admitted. As that the fine was before the Inrollment (being both in one Term) The uses of a fine or common Recovery may be averred: Or what, or who was meant, where there are two of a name, &c. *lib. 8. 155.* The Heir in tail cannot aver against a fine levied by his Ancestors, That *partes finis nihil habuerint*.

habuerint, lib. 3. 84, 85. Leon 75, 76. &c. But when Tenant in tayl accepts of a fine, and grants and renders the Land, by the same fine, which is Executory, there, if no execution be sued, in the life of Tenant in tayl, his Issue may aver continuance of possession, &c. in his Father, for this stands with the fine, and the acceptance of the fine alters not the Estate.

If a man and his Wife sell her Land for money, and after levy a fine to the Vendee and his Heirs, it may be averred it was for money, and so carry the use to the Vendee without any declaration of use, which otherwise would result to the Woman and her Heirs: and to other uses may be proved, than what are in an Indenture of uses sublequent to the conveyance, &c. *lib. 9. 8. 5. 26.*

Tenant in tail, with remainder in tail to A. Reversion in fee to himself, bargains and sells Land, &c. and levies a fine to him with Proclamation, with general warranty. The Conufee infeoffs A.

Resolved, The Bargainee had an Estate determinable upon the death of the Tenant in Tail (and also the reversion in fee, which the Bargainor had) and his Wife shall be endowed, but this determines upon the death of the Tenant in Tail.

Resolved, The fine doth not discontinue the remainder, for this doth not pass any Estate, but makes this Estate of the Bargainee durable, &c. so that it shall not determine, untill the Tenant in Tail die without Issue: and the conclusion may be confessed and avoided.

Resolved, the Warranty doth not barr the remainder, for this was annexed to the fee determinable, &c. and to the reversion in fee, and doth not extend to the remainder, for this was not displaced, and the Feoffee of the Conufee cannot enlarge, &c. 'Tis a Maxim that a Warranty barrs no Freehold, which is in esse, possession or remainder, &c. and not displaced before or at the time of the Warranty, although it be devested before the descent.

Resolved, A Warranty cannot enlarge the Estate.

Resolved, the Feoffment of the Conusee was not a discontinuance of the remainder, because he was not Tenant in Tail; so of the Grantee of *totum statutum suum*, &c.

Resolved, A Collateral Warranty may be given in evidence, and found by the Jury.

The Chief Justice held that by the Feoffment of the Conusee, the Remainder was not displaced nor put to a right, for his Fee simple, and his Fee determinate pass, and the Feoffment which in it self is not tortious, cannot be tortious to another. Otherwise it is when Tenant for life, or remainder in Tail, &c. makes a Feoffment, for the Feoffment it self is tortious.

Note, there are some titles, to which a Warranty doth not extend, as in the Case of an Exchange, condition upon a Mortgage, Mortmain, consent to a Ravisher, &c. for in these Cases no action lies, in which Voucher, or Rebutter may be, neither shall a descent take away Entry in these cases, and cannot be displaced out of their Original essence. Collateral Warranty shall barr dower, and yet an action is given for this. But a fine &c. and five years barr these titles, and dower also, if an action be not brought in time. *Seymour's Case. lib. 10. 96.*

Buckler and Harveys Case. lib. 2. 55.

Tenant for life leases for 4 years, and afterwards grants the Tenements *Hab. from P.* for life, after *P.* the Lessee attorns, then the Grantee enters and leases at will, to which Tenant at will the Tenant for life levies a fine *Come ceo*, &c. *Rem.* in fee enters.

Resolved, The Grant was void, for an Estate of Freehold cannot commence *in futuro*; and the Grant being void at the Commencement the Attornment afterwards cannot make it pass; and that the Grantee was a Disseisor: but if the Grant had been good at the Commencement, and was only to have its perfection by a subsequent act, as by livery upon a Charter of Feoffment, &c. and the Grantee enter before the perfection, he is not a Disseisor, but a Tenant at will.

Resol-

Resolved also, If the fine had been levied to the Disfeisor himself *Come c'*, &c. he which had the right of remainder, may enter for the forfeiture, for it was agreed, that the right of a particular Estate may be forfeited, and entry given to him who had but a right. As if Lessee for years be ousted, or Tenant for life Disfeised, and the Lessee for years brings an assise, or the Lessee for life a Writ of right, &c. 'Tis a forfeiture.

Resolved also, That the fine being levied to the Tenant at will, it is a forfeiture, and he which had the right of remainder may enter, and the Tenants for life and at will also, shall be estopped to say *quod partes finis nihil hab.* &c. and of such estoppels which are by matter of Record, and trench to the disherison of them in reversion, &c. they shall take advantage although they are strangers to the Record, for they are privies in Estate.

Resolved also, If the Disfeisee levy a fine to an estranger, the Disfeisor shall retain for ever; for the Disfeisee, against his own fine cannot claim the Land, and the Conusee cannot enter, for the right of the Conusor cannot be transferred to him, but by the fine the right is extinct, whereof the Disfeisor shall have advantage. But in *Crok 1. part 482. 13 Car.* it was moved, if the Disfeisee, not knowing of the Deseisin, levied a fine to a stranger, whether that should barr his right, and move to the benefit of the Disfeisor: according to *Bucklers Case*; and said, if admitted, would be of very mischievous consequence, and by two Judges held, that it should not enure to the benefit of the Disfeisor, but to the use of the Conusor himself, for otherwise a Disfeisin being secret, may be the cause of disherison of any one who intends to levy a fine for his own benefit, for assurance of his Lands upon his Wife and Children or otherwise. *1. Inst. 277.*

Not against such Certificates as are a definitive Tryal of the thing certified, As the Bishops Certificate of Excommunication, Bastardy, lawful Marriage, &c. so Certificates of the Marshal of the Host, which is a Tryal, but against

Against a Certificate;

gainst Certificates only of information it may be: As against Certificates upon Commission out of any Court, or of the Commissioners that affirm a man a Bankrupt, which are not Tryable in a course of Law, but Informations. *lib. 7. 14. lib. 8. 121.*

Upon a Return.

So of a return, if it is a definitive Tryal of the thing returned, no averment lyeth against it. As the return of a Sheriff upon some Writs, as a Writ of Partition, *Elegit*, and of *Hab. Corp.* from a Mayor, &c. But if the return is not definitive, as upon a Rescous, &c. an averment doth ly, and upon this it may go to Tryal: So if it be a return to indanger a mans Life, or his Inheritance; an averment may be had against it, *Dyer 348. 177.* So it lyeth against the returns of Bayliffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby. *Goldsb. 139. 129. pl. 23.*

Upon or against a Will or Administration, it lyeth, although they be under Seal of the Court.

An action for a false return, an averment doth ly against the Sheriffs return, *Winch 100.* and so it doth in any other action, than in that the return was in.

Any averment may be upon a Will or any part of it, that may help to expound it, and of such a thing that may stand with the Will, and may be collected out of the words. As which Son he meant, &c. *lib. 8. 31. 41.* But no averment against or besides that which is expressed in the Will, or which cannot be gathered to be the mind from the words, nor of any thing that doth not cohere with the Will: especially if it be about Lands. As in the Lord *Cheyneys* Case, *lib. 5. 68.* A devise to *A.* and the Heirs of his body, the remainder to *B.* and the Heirs Males of his Body, on condition that *he or they or any of them shall not alien, &c.* no averment shall be taken to prove by Witnesses or other evidence, that the Devisor intended to include *A.* within this condition by the words *he or they*: for the construction of Wills ought to be collected out of the words of the Will in writing, and not by any averment or proof out of it.

Against Court Rolls, or upon them.

It lyes against the Rolls or Records of County Courts, Hundred Courts, Courts Baron. As that there is no such Record, or it is not as it is certified. *34 H. 6. 42. 9 E. 4. 4.*

No

No Averment or proof is to be admitted against common presumption, as that there was more Rent behind when the acquittance of the last Rent was made. 1. *Inst.* 373. Nor against common reason, as that Land doth belong to Land or to a messuage. *Pl.* 170. *lib.* 437.

If the matter contained in an award and the matter in the submission do not agree, it will hardly be supplied by an averment. *Dyer* 242. 52. Upon an award.

If the Defeasance of a Recognisance be dated before the Recognisance, it may be averred to be delivered at or before the time of the Recognisance entered into. *Parkins Case* 147. Date.

Things apparent or necessarily intendable by Law, need not be averred, *manifesta non probatione indigent*; *Quod constat clare, non debet verificari. lib.* 11. 25. *Pl.* 8.

Chief Justice *Anderson* held, *Godbolt* 131. that if one devise Lands to the Heirs of *J. S.* and the Clerk writes it to *J. S.* and his Heir, that the same may be holpen by averment, because the intent of the Devisor is written, and more, and it shall be naught for that which was against his Will, and good for the residue. But if a Devise be to *J. S.* and his Heirs, and it is written but to the Heirs of *J. S.* there an averment shall not make it good to *J. S.* because it is not in writing, which the Law requires; And so an averment to take away any surplussage is good, but not to increase that which is defective in the Will of the Testator. But with submission, if the Law should admit of such averments, it would be as mischievous one way as the other, and no man could know by the words of the Will, what construction to make; nor what advice to give, but this shall be controlled by collateral averments out of the Will; and instead of proving the Testators Will, it would be the destroying of it. Devise.

If the partition be by Writ, although it be unequal, yet it shall not be avoided by averment, but shall bind the Feme Coverts. And such averment against the return of the Sheriff shall not be good. 1. *Inst.* 171. Partition.

Consideration.

A valuable consideration in a Bargain and Sale not expressed, may be averred: 2. *Inst.* 672.

Uses.

A consideration which consists with the Deed, and not repugnant, may be averred, as in a Bargain and Sale, if a particular consideration be expressed, and the general clause, of *other good causes and considerations*, or without that general clause, yet other considerations may be shewed: so if the particular consideration be love and affection, yet payment of money may be shewed: so a precedent intent of uses, and to levy a fine, may be shewed to guide the use of the fine. *Rolls tit. uses* 790.

As if I covenant by Deed to purchase Land, and then to levy a fine, or make a Feoffment thereof to the use of another, and afterwards purchase and levy a fine, or make a Feoffment, this use shall rise: For the Deed is an evidence of the precedent intent, and the uses of a fine or Feoffment may be directed by the precedent intent, and yet such intent is countermandable. But a covenant to purchase and stand seised of Lands to uses, shall not raise the use after the purchase, because the use is to rise by the Deed, and at the time when the Deed was made, there was no Estate in the Land. *ibidem.*

So if one joyntenant covenant to stand seised of his Companions part, if he survive, yet no use shall rise if he did survive, because at the time of the Covenant he could not grant nor charge the Land. *ibid.*

Fine sur grant and render use.

'Tis true that a fine sur grant and render, unless it be in special cases, cannot be averred by parol to be to any other use or intent than what is expressed in the fine, Feoffment or other conveyance: But there is a diversity betwixt a use and consideration; for when a fine, Feoffment or other conveyance import an express consideration a man may aver, by word, another consideration, which may stand with the consideration expressed; but the parties cannot by parol aver any other use than is contained in the same conveyance. Also no averment shall be against the

the consideration expressed : But yet in some cases a fine *Sur grant and render*, may be ruled and directed in part by averment *per parol* ; and this is when the original Bargain and Contract betwixt the parties, is by Indenture or other Deed : As where it is agreed by Indenture, that a Fine shall be levyed of certain Lands by the name of a certain number of Acres to divers persons, and that they shall grant and render the Land again in fee simple, which shall be to certain uses, the Fine is levyed of the Land, but there is some variance betwixt the number of Acres comprised in the Fine, or the Fine is levyed to one of the parties only, who grants and renders the Land, so that there is a variance betwixt the Covenant and the Fine, either in the number, time, or person, &c. Yet this Fine shall be averred to be to the uses in the Indentures. For the intent of the parties and the substance and effect of their original bargain and agreement, is chiefly to be regarded in all conveyances ; and therefore the Law allows an averment by parol, to reconcile the Fine and Indentures, although this sort of Fine imports a consideration in it self, and regularly by a naked averment by parol, cannot be averred to be to any other use or intent than is comprised in the Fine it self ; but by Deed it may be. *lib. 2. 77.*

And although a Fine be of so high a nature, that it will not permit naked averments against the purpose and Consuance of the Fine ; yet when the Law requires one of necessity, and for conformity to joyn with another in a Fine, the Law permits, to shew the verity of the matter, to avoid prejudice, and confusion. As where Baron and Feme an Infant levy a Fine, which is reversed for the non-age of the Wife, The Baron and feme shall have restitution presently, and the Conusee shall not detain this during the Coverture ; for all the Estate passes from the Feme, and the Baron joyns for necessity, and conformity, and therefore the Law permits, that the verity of this shall be shewed, and that the whole Estate shall be restored to the Wife

during

during the life of the Husband, *Worsely* and his Wife against *Charnock*. 30 and 31 *Eliz. lib. 2. 77.*

What may be averred *contra & præter Records, Fines, Recoveries, Deeds, Wills, &c.* is very requisite for a good Evidencer to be ready in, and therefore I have here given this taste, referring him to the Books at large, where he may see, what averments he in remainder, the Heir in Tayl, the Wife, her Heirs, Estrangers, Privies, Partles, &c. may have to Fines, Recoveries, &c. *lib. 1. 76. lib. 2. 77. lib. 4. 71. lib. 9. 140, 141. lib. 2. 55. lib. 88. lib. 10. 50, 96. lib. 3. 51, 88. lib. 72, 74. &c.*

Affault.

Battery.

In Assault and Battery, if the Plaintiff prove only the Assault, he shall recover, for an action of Trespass lyes for an Assault, of an Assault and Battery, Assault and menace, &c. see *Rolls tit. Trespass. 545. F. N. B. 91. a. &c.*

To lay hands gently upon the shoulders of a man, and say that is He, against whom the Justice's Warrant is : Or to serve him with a *subpoena*, proves no Battery.

These things following are good justifications, but cannot be given in evidence upon the general Issue.

Correction by the Parents, Master, Schoolmasters. Apprehension of a common Cheater at Dice. *Moliter manus imposuit*, upon one setting a Dog upon him. Beating one by the Husband in defence of his Wife. By the Master in defence of his Servant; or by the Servant in defence of his Master. Holding a man that cometh to stop the River to his Mill: or to throw down his Booth. Inevitably discharging his Musquet in the Plaintiffs face, at a Muster. Beating one in defence of his Possession of his Goods, House, Lands, Goods distreyned, &c. By a Forester of one who resisted in the Forest. That he imprisoned another to prevent mischief: As the killing of another, with whom he was fighting, (not wrangling with words) until the fury be over.

Lunacy will not excuse in Battery, although it will of Felony. Note a man may justify an Assault and Battery, but not wounding or maiming of life or member, or mayhem in defence of the possession of his Lands or Goods. 2.

2nst. 316.

An erroneous Process to an Officer out of a Court, having Jurisdiction, In aid of the Bayliffs: That the Executor entred the Plaintiffs ground, to take the Testators Timber there. That he had a Piscary, and put Skakes in the soil. Taking his Goods stollen, in the Plaintiffs house, upon fresh pursuit. Entering his soil to throw down a Nuisance. Or to take my Cattle, which the Plaintiff put in his ground. To throw down the Plaintiffs house on fire, next mine. Breaking his Windows or house, to get out, where he imprisoned me. To take a handful of Grain out of his heap, who took one out of mine, and threw it into his. To carry away his Grain, or money which he threw into my heap. To chase his Cattle with a Dog out of my ground, Damage feasant. To throw that into the Plaintiffs ground which he threw into mine. That my Cattle took a mouthful, &c. of his Grass, passing in the way I had over his ground, against my will. Throwing Goods into the Thames, out of a Barge to save the lives of the Passengers. To fetch out of the Plaintiffs ground, the trees he granted me. To Dig his ground, to amend my Pipe there. That I hunted Cattle out of my ground with a Dog, which against my will run into his ground, I rating and recalling him. A prescription to cut Grass in the Plaintiffs ground, lying nigh the Church, to estrow the Church, being but an easment.

Distress by a stranger, as Bayliff, and the assent of the party. By the command of the Chief Justice, Order of Chancery, &c. *Rolls tit. Trespas.* 559. That the Plaintiff ought to Impale against a Forest, and for default of Pales, the Beasts went in, and the Forester fetched them out.

These are justifications and excuses that must be pleaded, and cannot be given in evidence upon Not Guilty, unless it be in mitigation of Damages.

Trespas lies for goods stollen, although the Thief be convicted of Felony. *Latch* 144. *Markhams Case* and so I knew my Lord *Hales* held, although in *Rolls tit. Trespas* 557. 'tis said, if it appears on the

Tenant in com^m mon, cannot justifie to enter into his Companions ground to take the horse they have in Common, although he may take him elsewhere.

Trespas.

Felony.

evidence that it was Felony, Trespass lies not. Which I think is not Law.

Sow to halves.

A man who sows the Land to halves with the Owner, or three agree to sow the Land, where two of them have no interest, and a stranger take the Corn, they cannot joyn in Trespass, having no interest but an agreement, but the owner only must bring the Trespass *Cro. 3. part 143. Goldsb. 77.*

Outlawry reversed.

Upon reversing an Outlawry, the party is restored, & may have Trespass, but upon reversal of a Judgment the party shall only be restored to the money for which the Sheriff sold his Term, upon a *fieri fac. Cro. 3. part 270.*

Tenancy in Common.

Upon Not Guilty in Trespass, *Quare clausum fegit*, at the Tryal the Defend. shall not say that the Plaintiff is Tenant in Common; he should have pleaded this, and hath now lost this advantage: and if the Jury find it, their finding is not material. *Cro. 3. part 554.*

A man sells all his Woods standing, growing, &c. upon the premises, to hold during the life of the Vendor, rendering Rent; The Vendee cuts down all the Trees: if he cuts wood afterwards growing in the same place, the Vendor may have Trespass. *Leon. 3. part 7.*

Where Tenants in Common shall joyn in

an action and where not, & what actions the one shall have against the other. See

1. Inst. 197, 200. &c. Woods.

Trover against a Carriers.

Copyholder.

Estray.

Continuando.

If a Carrier lose goods, a special action of the Case lies against him, but not Trover, *Roll. Abridg. 6. so of a common Carrier by Boat. Noy. 114.*

Trespass lies for a Copy-holder against the Lord for cutting down Trees, that he the Tenant ought to have for repairs, *Godbolt 173.*

By seizure of an Estray the Lord hath but the Custody, and not the property, and therefore if he works the Horse, Trespass lies. *Yelverton 96, 97.*

Trespass with a *continuando* cannot be for taking a Horse, nor 10. Trees, &c. nor without a re-entry of the disseised, unless his re-entry be taken away by the act of God, or the Estate be determined, so that he cannot enter, as if Tenant *per antea* *vie* be disseised, and *cestuique dy*, for there his entry is taken away by the act of God; otherwise if it be

be taken away by his own act, as if he release to the Disseisor, &c. 19 H. 6.28.

General Trespass for breaking his Park, and taking his Deer, &c. doth not ly at Common Law, but a Writ is given by the Statute *Westm. 1. cap. 20.* so if A. have a free Warren in the soil of B. A. shall not have Trespass, but case for entering the Warren and stopping the holes &c.

Park.
Warren.

A Commoner cannot have Trespass for the Grass. After a *superfedeas* shewed to the Bayliffs, false imprisonment lies against them, not against the Sheriff; so against the Bayliff of a Franchise, if he takes other mens goods in execution upon the Sheriffs warrant, not against the Sheriff, nor against the party, unless he procure the Bayliff to take the wrong.

Commoner.
False Imprisonment.

He that hath the Freehold in Law unless he hath actual possession cannot have Trespass. Therefore the Heir cannot have Trespass against the abater, nor against Tenant at sufferance, before he hath entred, and only from that time: but an Executor, or Administrator shall, by relation, have Trespass from the death of the Intestate, &c. But a disseissee after entry, shall have an action for all mean Trespasses from the disseisin, even against strangers, for he is restored to the possession *ab initio*.

Possession.
Entry.
Relation.

Trespasses cannot be maintained against him who comes to the goods lawfully, as by the Plaintiffs delivery, or under that, or by act in Law, &c. but detainee. But Trespass lies against Tenant at will, or him that I lend my goods to, who destroys them; for thereby the privity is determined. It lies against a Miller for taking Toll where none is due: For taking my Servant out of my service, for rescuing one taken at my suit out of the Bayliffs hands, for the Bayliff is my servant. For beating my Wife or Servant *per quod*, &c. Not against him that J.S. sells my Horse to, or has my goods from the Sheriff, although the Sheriff took them wrongfully. It lies for hunting a Fox, &c. in my ground. Against Church-Wardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good.

Trespass.

For

For digging so near my ground, that it fell into the Defendants pit: But not that my house fell into the pit; for 'twas my fault to build so near another mans ground: for entering my ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

Time.

Although I sell the goods, it lies for a Trespass done before. Tender of sufficient amends before the action brought, is a good Bar, for a negligent Trespass, not for a voluntary one.

Bar.

Ab initio.

If a man enter into a place by authority of Law, and abuse this authority, he is a Trespasser *ab initio*, for his first entry shall be intended for this purpose. As if the Lessor enter to view Wast, and stays there all night. If the Kings Purveyor sells my goods. If the searcher abuses my stuffs. If a man will stay in a Tavern all night. If he detains a distress after amends tendered before impounding. If a Bayliff refuse Bail, Trespass doth not lie against him *ab initio*; but case, for the Sheriff or Undersheriff, not he; ought to take Bail; not against the party, nor Bayliff, or person in aid, if the Sheriff doth not return his Writ of *Latitat*, or makes a false return; but it doth against the Sheriff: So of an Officer of an inferior Court.

If the Lord work an Estray, Distress, &c. Or Executors find a Bond and cancel it, thinking it was discharged, and it was not; They are Trespassers *ab initio*, although they came lawfully to the possession at first. *Rolts tit. Trespals* 563.

Lunatick.

The Lunatick (and not the person to whom he is committed) must bring the action in his name for a Trespass done in the Land. *Brownl. 1. part* 197.

Note, the Chapter of Verdicts gives much light to know what evidence is good and what not.

The knowledge, of evidence is so beneficial, and necessary, for all Practicers in the Law; That none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this particular, I have drained the Law-books, of all, or the most principal Cases, relating to it; and have added some observations, very fit for the unlearned, to know, and I hope not fit for the learned to reject.

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